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No. 10629

United States *VHL*
Circuit Court of Appeals
For the Ninth Circuit. *2371*
—

CLARENCE O. FLANNAGAN,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.
—

Transcript of Record
—


Upon Appeal from the District Court of the United States
for the Southern District of California,
Central Division

FILED

MAY 22 1944

PAUL P. O'BRIEN,

CLERK



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Upon Appeal from the District Court of the United States
for the Southern District of California,
Central Division

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur.]

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NAMES AND ADDRESSES OF ATTORNEYS

For Appellant:

CANTILLON & GLOVER

Petroleum Building
Olympic at Flower
Los Angeles 15, Calif.

For Appellee:

CHARLES H. CARR,

United States Attorney

JAMES M. CARTER,

Assistant United States Attorney

ERNEST A. TOLIN,

Assistant United States Attorney

600 U. S. Post Office and Court House Bldg.
Los Angeles 12, Calif. [1*]

*Page numbering appearing at foot of page of original certified Transcript of Record.

At a stated term, to-wit: The February Term, A D. 1943, of the District Court of the United States of America, within and for the Central Division of the Southern District of California, held at the Court Room thereof, in the City of Los Angeles on Thursday the 15th day of July in the year of our Lord one thousand nine hundred and forty-three.

Present: The Honorable C. E. Beaumont, District Judge.

No. 16-107-Crim.

UNITED STATES OF AMERICA,

Plaintiff,

vs

CLARENCE O. FLANNAGAN,

Defendant.

On motion of R. F. Duni, Esq., Assistant U. S. Attorney, appearing for the Government, who presents an Information to the Court in this cause, it is ordered that said information be filed, that the bond of the defendant Clarence O. Flannagan be, and it hereby is, fixed in the sum of \$1,000.00 and that a bench warrant be issued for the apprehension of the said defendant.

F. M. Harvey, reporter, present and reporting the proceedings. [2]

\$1,000 Bond B/W

This Information contains twelve (12) Counts charging Clarence O. Flannagan with the violation of Revised Maximum Price Regulation No. 169, Revised Maximum Price Regulation No. 239 and Revised Maximum Price Regulation No. 148, issued pursuant to the Emergency Price Control Act of 1942. (The maximum penalty on each Count consists of one (1) year imprisonment and/or a fine of Five Thousand Dollars (\$5,000) or both, with no minimum penalty provided).

Clarence O. Flannagan
325 Santa Ana Avenue
Newport Heights, California [3]

In the District Court of the United States, Southern
District of California, Central Division

No. 16107-Crim.

UNITED STATES OF AMERICA

Plaintiff,

vs.

CLARENCE O. FLANNAGAN,

Defendant.

INFORMATION

Comes now Charles H. Carr, United States Attorney in and for the Southern District of California, Central Division, who for the United States and in its behalf, prosecutes in his own proper

person, and with leave of Court first had and obtained, gives the Court here to understand and be informed as follows to-wit: [4]

COUNT ONE

That on or about June 25, 1943, in the City of Fullerton, County of Orange, State of California, in the District aforesaid and in the Central Division thereof, and within the jurisdiction of this Court, Clarence O. Flannagan, doing business as West Coast Meat Company, hereinafter called "the defendant", did make a "Peddler-Truck Sale" of certain meat products to Jack Casparie; that said defendant did knowingly, wilfully and unlawfully give a false invoice covering said Peddler-Truck Sale of said meat products, in that said defendant did give an invoice covering said Peddler-Truck Sale on West Coast Meat Company invoice No. 7808, dated June 25, 1943, showing the total price charged and received for the meat products listed on said invoice No. 7808 to be \$101.42, whereas in truth and in fact, as the defendant then and there well knew, the total price charged and received for the meat items shown on invoice No. 7808 was \$127.57, in violation of Revised Maximum Price Regulation No. 169 (7 Fed. Reg. 10381) as amended, issued by Leon Henderson as Administrator of the Office of Price Administration, pursuant to Section 2 of the Emergency Price Control Act of 1942, and in violation of Revised Maximum Price Regulation No. 148 (7 Fed. Reg. 8609) as amended, issued by Leon Henderson as Adminis-

trator of the Office of Price Administration, pursuant to Section 2 of the Emergency Price Control Act of 1942 (Emergency Price Control Act of 1942, Pub. L. 421, 77th Cong. 2d Sess., 56 Stat. 23, January 30, 1942); contrary to the form of the statute in such case made and provided and against the peace and dignity of the United States. [5]

COUNT TWO

That on or about June 4, 1943, in the City of Fullerton, County of Orange, State of California, in the District aforesaid and in the Central Division thereof, and within the jurisdiction of this Court, Clarence O. Flannagan, doing business as West Coast Meat Company, hereinafter called "the defendant", did make a "Peddler-Truck Sale" of certain meat products to Jack Casparie; that said defendant did knowingly, wilfully and unlawfully give a false invoice covering said Peddler-Truck Sale of said meat products, in that said defendant did give an invoice covering said Peddler-Truck Sale on West Coast Meat Company invoice No. 7678, dated June 4, 1943, showing the total price charged and received for the meat products listed on said invoice No. 7678 to be \$288.27, whereas in truth and in fact, as the defendant then and there well knew, the total price charged and received for the meat items shown on invoice No. 7678 was \$385.47, in violation of Revised Maximum Price Regulation No. 169 (7 Fed. Reg. 10381) as amended, issued by Leon Henderson as Administrator of the Office of Price Administration, pur-

suant to Section 2 of the Emergency Price Control Act of 1942 (Emergency Price Control Act of 1942, Pub. L. 421, 77th Cong. 2d Sess., 56 Stat. 23, January 30, 1942); contrary to the form of the statute in such case made and provided and against the peace and dignity of the United States. [6]

COUNT THREE

That on or about June 8, 1943, in the City of Fullerton, County of Orange, State of California, in the District aforesaid and in the Central Division thereof, and within the jurisdiction of this Court, Clarence O. Flannagan, doing business as West Coast Meat Company, hereinafter called "the defendant", did make a "Peddler-Truck Sale" of certain meat products to Jack Casperie; that said defendant did knowingly, wilfully and unlawfully give a false invoice covering said Peddler-Truck Sale of said meat products, in that said defendant did give an invoice covering said Peddler-Truck Sale on West Coast Meat Company invoice No. 7702, dated June 8, 1943, showing the total price charged and received for the meat products listed on said invoice No. 7702 to be \$178.63, whereas in truth and in fact, as the defendant then and there well knew, the total price charged and received for the meat items shown on invoice No. 7702 was \$244.03, in violation of Revised Maximum Price Regulation No. 169, (7 Fed. Reg. 10381) as amended, issued by Leon Henderson as Administrator of the Office of Price Administration, pursuant to Section 2 of the Emergency Price Control

Act of 1942, and in violation of Revised Maximum Price Regulation No. 239 (7 Fed. Reg. 10688) as amended, issued by Leon Henderson as Administrator of the Office of Price Administration, pursuant to Section 2 of the Emergency Price Control Act of 1942 (Emergency Price Control Act of 1942, Pub. L. 421, 77th Cong. 2d Sess., 56 Stat. 23, January 30, 1942); contrary to the form of the statute in such case made and provided and against the peace and dignity of the United States. [7]

COUNT FOUR

That on or about June 11, 1943, in the City of Fullerton, County of Orange, State of California, in the District aforesaid and in the Central Division thereof, and within the jurisdiction of this Court, Clarence O. Flannagan, doing business as West Coast Meat Company, hereinafter called "the defendant", did make a "Peddler-Truck Sale" of certain meat products to Jack Casperie; that said defendant did knowingly, wilfully and unlawfully give a false invoice covering said Peddler-Truck Sale of said meat products, in that said defendant did give an invoice covering said Peddler-Truck Sale on West Coast Meat Company invoice No. 7731, dated June 11, 1943, showing the total price charged and received for the meat products listed on said invoice No. 7731 to be \$448.22, whereas in truth and in fact, as the defendant then and there well knew, the total price charged and received for the meat items shown on invoice No. 7731 was \$606.22, in violation of Revised Maximum Price

Regulation No. 169 (7 Fed. Reg. 10381) as amended, issued by Leon Henderson as Administrator of the Office of Price Administration, pursuant to Section 2 of the Emergency Price Control Act of 1942, and in violation of Revised Maximum Price Regulation No. 148 (7 Fed. Reg. 8609) as amended, issued by Leon Henderson as Administrator of the Office of price Administration, pursuant to Section 2 of the Emergency Price Control Act of 1942 (Emergency Price Control Act of 1942, Pub. L. 421, 77th Cong. 2d Sess., 56 Stat. 23, January 30, 1942; contrary to the form of the statute in such case made and provided and against the peace and dignity of the United States. [8]

COUNT FIVE

That on or about June 15, 1943, in the City of Fullerton, County of Orange, State of California, in the District aforesaid and in the Central Division thereof, and within the jurisdiction of this Court, Clarence O. Flannagan, doing business as West Coast Meat Company, hereinafter called "the defendant", did make a "Peddler-Truck Sale of certain meat products to Jack Casperie; that said defendant did knowingly, wilfully and unlawfully give a false invoice covering said Peddler-Truck Sale of said Meat Products, in that said defendant did give an invoice covering said Peddler-Truck Sale on West Coast Meat Company invoice No. 7752, dated June 15, 1943, showing the total price charged and received for the meat products listed on said invoice No. 7752 to be \$54.94, whereas in

truth and in fact, as the defendant then and there well knew, the total price charged and received for the meat items shown on invoice No. 7752 was \$69.19, in violation of Revised Maximum Price Regulation No. 148 (7 Fed. Reg. 8609) as amended, issued by Leon Henderson as Administrator of the Office of Price Administration, pursuant to Section 2 of the Emergency Price Control Act of 1942 (Emergency Price Control Act of 1942, Pub. L. 421, 77th Cong. 2d Sess., 56 Stat. 23, January 30, 1942; contrary to the form of the statute in such case made and provided and against the peace and dignity of the United States. [9]

COUNT SIX

That on or about July 1, 1943, in the City of Fullerton, County of Orange, State of California, in the District aforesaid and in the Central Division thereof, and within the jurisdiction of this Court, Clarence O. Flannagan, doing business as West Coast Meat Company, hereinafter called "the defendant", did make a "Peddler-Truck Sale" of certain meat products to Jack Casparie; that said defendant did knowingly, wilfully and unlawfully give a false invoice covering said Peddler-Truck Sale of said meat products in that said defendant did give an invoice covering said Peddler-Truck Sale on West Coast Meat Company invoice No. 7832, dated July 1, 1943, showing the total price charged and received for the meat products listed on said invoice No. 7832 to be \$450.51, whereas in truth and in fact, as the defendant then and there

well knew, the total price charged and received for the meat items shown on invoice No. 7832 was \$609.41, in violation of Revised Maximum Price Regulation No. 169 (7 Fed. Reg. 10381) as amended, issued by Leon Henderson as Administrator of the Office of Price Administration, pursuant to Section 2 of the Emergency Price Control Act of 1942, and in violation of Revised Maximum Price Regulation No. 239 (7 Fed. Reg. 10688) as amended, issued by Leon Henderson as Administrator of the Office of Price Administration, pursuant to Section 2 of the Emergency Price Control Act of 1942, and in violation of Revised Maximum Price Regulation No. 148 (7 Fed. Reg. 8609) as amended, issued by Leon Henderson as Administrator of the Office of Price Administration, pursuant to Section 2 of the Emergency Price Control Act of 1942 (Emergency Price Control Act of 1942, Pub. L. 421, 77th Cong. 2d Sess., 56 Stat. 23, January 30, 1942); contrary to the form of the statute in such case made and provided and against the peace and dignity of the United States. [10]

COUNT SEVEN

That on or about the 2nd day of July, 1943 in the City of Fullerton, County of Orange, State of California, in the District aforesaid and in the Central Division thereof, and within the jurisdiction of this Court, Clarence O. Flannagan, doing business as West Coast Meat Company, hereinafter called "the defendant", did make a "Peddler-Truck Sale" of certain meat products to Jack Cas-

parie; that said defendant did knowingly, wilfully and unlawfully give a false invoice covering said Peddler-Truck Sale of said meat products, in that said defendant did give an invoice covering said Peddler-Truck Sale on West Coast Meat Company invoice No. 7840, dated July 2, 1943, showing the total price charged and received for the meat products listed on said invoice No. 7840, to be \$367.86, whereas in truth and in fact, as the defendant then and there well knew, the total price charged and received for the meat items shown on invoice No. 7840 was \$537.18, in violation of Revised Maximum Price Regulation No. 169 (7 Fed. Reg. 10381) as amended, issued by Leon Henderson as Administrator of the Office of Price Administration, pursuant to Section 2 of the Emergency Price Control Act of 1942, and in violation of Revised Maximum Price Regulation No. 148 (7 Fed. Reg. 8609) as amended, issued by Leon Henderson as Administrator of the Office of Price Administration, pursuant to Section 2 of the Emergency Price Control Act of 1942 (Emergency Price Control Act of 1942, Pub. L. 421, 77th Cong. 2d Sess., 56 Stat. 23, January 30, 1942); contrary to the form of the statute in such case made and provided and against the peace and dignity of the United States. [11]

COUNT EIGHT

That on or about June 3, 1943, in the City of Anaheim, County of Orange, State of California, in the District aforesaid and in the Central Division thereof, and within the jurisdiction of this

Court, Clarence O. Flannagan, doing business as West Coast Meat Company, hereinafter called "the defendant", did knowingly, wilfully and unlawfully offer for sale, sell and deliver to R. H. Richards, doing business as Rich's Market, one beef carcass, U. S. Grade A, weighing 640 pounds, for the sum of \$225.83, which said beef carcass U. S. Grade A, weighing 640 pounds, had a maximum price of \$155.20 under the provisions of Revised Maximum Price Regulation No. 169 (7 Fed. Reg. 10381) as amended, issued by Leon Henderson as Administrator of the Office of Price Administration, pursuant to Section 2 of the Emergency Price Control Act of 1942 (Emergency Price Control Act of 1942, Pub. L. 421, 77th Cong. 2d Sess., 56 Stat. 23, January 30, 1942); contrary to the form of the statute in such case made and provided and against the peace and dignity of the United States. [12]

COUNT NINE

That on or about June 7, 1943, in the City of Anaheim, County of Orange, State of California, in the District aforesaid and in the Central Division thereof, and within the jurisdiction of this Court, Clarence O. Flannagan, doing business as West Coast Meat Company, hereinafter called "the defendant", did make a "Peddler-Truck Sale" of certain meat products to R. H. Richards, doing business as Rich's Market; that said defendant did knowingly, wilfully and unlawfully give a false invoice covering said Peddler-Truck Sale of said meat products, in that said defendant did give an

invoice covering said Peddler-Truck Sale on West Coast Meat Company invoice No. 7693, dated June 7, 1943, showing the total price charged and received for the meat products listed on said invoice No. 7693 to be \$192.53, whereas in truth and in fact, as the defendant then and there well knew, the total price charged and received for the meat items shown on Invoice No. 7693 was \$281.15, in violation of Revised Maximum Price Regulation No. 169 (7 Fed. Reg. 10381) as amended, issued by Leon Henderson as Administrator of the Office of Price Administration, pursuant to Section 2 of the Emergency Price Control Act of 1942, and in violation of Revised Maximum Price Regulation No. 148 (7 Fed. Reg. 8609) as amended, issued by Leon Henderson, as Administrator of the Office of Price Administration, pursuant to Section 2 of the Emergency Price Control Act of 1942 (Emergency Price Control Act of 1942, Pub. L. 421, 77th Cong. 2d Sess., 56 Stat. 23, January 30, 1942); contrary to the form of the statute in such case made and provided and against the peace and dignity of the United States. [13]

COUNT TEN

That on or about June 25, 1943, in the City of Anaheim, County of Orange, State of California, in the District aforesaid and in the Central Division thereof, and within the jurisdiction of this Court, Clarence O. Flannagan, doing business as West Coast Meat Company, hereinafter called "the defendant", did knowingly, wilfully and unlawfully

offer for sale, sell and deliver to James R. Kilduff, doing business as Kilduff's Market, at 225 East Center Street, Anaheim, California, one side of U. S. Grade A beef, weighing 564 pounds, for the sum of $29\frac{1}{4}$ c per pound, which said side of U. S. Grade A beef, weighing 564 pounds, had a maximum price of not more than $22\frac{1}{4}$ c per pound under the provisions of Revised Maximum Price Regulation No. 169 (7 Fed. Reg. 10381) as amended, issued by Leon Henderson as Administrator of the Office of Price Administration, pursuant to Section 2 of the Emergency Price Control Act of 1942 (Emergency Price Control Act of 1942, Pub. L. 421, 77th Cong. 2d Sess., 56 Stat. 23, January 30, 1942); contrary to the form of the statute in such case made and provided and against the peace and dignity of the United States. [14]

COUNT ELEVEN

That on or about June 28, 1943, in the City of Anaheim, County of Orange, State of California in the District aforesaid and in the Central Division thereof, and within the jurisdiction of this Court, Clarence O. Flannagan, doing business as West Coast Meat Company, hereinafter called "the defendant", did knowingly, wilfully and unlawfully offer for sale, sell and deliver to James R. Kilduff, doing business as Kilduff's Market, at 225 East Center Street, Anaheim, California, one U. S. Grade B beef carcass, weighing 425 pounds, for the sum of $27\frac{1}{4}$ c per pound, which said U. S. Grade B beef carcass had a maximum price of not more than

20 $\frac{1}{4}$ c per pound under the provisions of Revised Maximum Price Regulation No. 169 (7 Fed. Reg. 10381) as amended, issued by Leon Henderson as Administrator of the Office of Price Administration, pursuant to Section 2 of the Emergency Price Control Act of 1942 (Emergency Price Control Act of 1942, Pub. L. 421, 77th Cong. 2d Sess., 56 Stat. 23, January 30, 1942); contrary to the form of the statute in such case made and provided and against the peace and dignity of the United States. [15]

COUNT TWELVE

That on or about July 1, 1943, in the City of Anaheim, County of Orange, State of California, in the District aforesaid and in the Central Division thereof, and within the jurisdiction of this Court, Clarence O. Flannagan, doing business as West Coast Meat Company, hereinafter called "the defendant", did make a "Peddler-Truck Sale" of certain meat products to L. M. Pickel, doing business as Pickel's; that said defendant did knowingly, wilfully and unlawfully give a false invoice covering said Peddler-Truck Sale of said meat products, in that said defendant did give an invoice covering said Peddler-Truck Sale on West Coast Meat Company invoice No. 7834, dated July 1, 1943, showing the total price charged and received for the meat products listed on said invoice No. 7834 to be \$38.93, whereas in truth and in fact, as the defendant then and there well knew, the total price charged and received for the meat items shown on invoice No. 7834 was \$52.77, in violation of Revised Maximum

Price Regulation No. 169 (7 Fed. Reg. 10381) as amended, issued by Leon Henderson as Administrator of the Office of Price Administration, pursuant to Section 2 of the Emergency Price Control Act of 1942, and in violation of Revised Maximum Price Regulation No. 239 (7 Fed. Reg. 10688) as amended, issued by Leon Henderson as Administrator of the Office of Price Administration, pursuant to Section 2 of the Emergency Price Control Act of 1942 (Emergency Price Control Act of 1942, Pub. L. 421, 77th Cong. 2d Sess., 56 Stat. 23, January 30, 1942); contrary to the form of the statute in such case made and provided and against the peace and dignity of the United States.

Wherefore, said United States Attorney prays that process of this Court be issued against Clarence O. Flannagan and that he be dealt with according to law.

CHARLES H. CARR

United States Attorney

By CHARLES H. VEALE

Assistant United States

Attorney [16]

VERIFICATION

State of California

County of Los Angeles

United States of America—ss.

Stanley Gorman, being first duly sworn, upon oath deposes and says:

That he is an employee of the United States Government, to-wit, an Investigator for the Office

of Price Administration, an agency of the United States Government; that in the course of his duty as an Investigator for the Office of Price Administration he made an investigation of the matters set forth and mentioned in the foregoing Information against Clarence O. Flannagan; that he has read the above and foregoing Information and knows the contents thereof and that the matters set forth therein are true of his own knowledge.

STANLEY GORMAN

Subscribed and sworn to before me this 13th day of July, 1943.

[Seal] ESTHER BLAISDELL

Notary Public in and for the County of Los Angeles, State of California.

My Commission Expires May 14, 1946.

[Endorsed]: Filed July 15, 1943. [17]

[Title of District Court and Cause.]

NOTICE OF MOTION TO QUASH AND
SET ASIDE INFORMATION

To the United States of America and Charles H. Carr, its attorney:

You and each of you will please take notice that the defendant herein, Clarence O. Flannagan, by and through his attorney, William Katz, will move the above entitled Court in Courtroom 1 thereof, Federal Building, Los Angeles, on Wednesday,

July 26, at the hour of 10:00 A.M. thereof or as soon thereafter as counsel may be heard, to quash and set aside the information and each count thereof filed by plaintiff herein.

Said motion will be made upon the grounds that said information and each count thereof fails to state facts sufficient to constitute a criminal offense, that the laws, rules and regulations upon which said information purports to be based are arbitrary, discriminatory, unreasonable, invalid, unconstitutional and void and that the United States Attorney in and for the Southern District of California, Central Division, has not been authorized [18] or directed to institute the above entitled proceedings by the Secretary of Agriculture, and that the Secretary of Agriculture did not, prior to the commencement of the above proceeding or at any other time, approve the institution of the above entitled action.

Said motion will be based upon this notice of motion, the information filed herein and the law governing.

Dated this 20 day of July, 1943.

WILLIAM KATZ

Attorney for Defendant.

[Endorsed]: Filed July 21, 1943. [19]

[Title of District Court and Cause.]

DEMURRER TO INFORMATION

Comes now Clarence O. Flannagan, defendant herein, by and through his attorney, William Katz, and demurs to the information filed by plaintiff herein upon the following grounds:

I.

That said information fails to state facts sufficient to constitute a criminal offense.

II.

That Count One of said information fails to state facts sufficient to constitute a criminal offense.

III.

That Count Two of said information fails to state facts sufficient to constitute a criminal offense.

IV.

That Count Three of said information fails to state facts sufficient to constitute a criminal offense. [20]

V.

That Count Four of said information fails to state facts sufficient to constitute a criminal offense.

VI.

That Count Five of said information fails to state facts sufficient to constitute a criminal offense.

VII.

That Count Six of said information fails to state facts sufficient to constitute a criminal offense.

VIII.

That Count Seven of said information fails to state facts sufficient to constitute a criminal offense.

IX.

That Count Eight of said information fails to state facts sufficient to constitute a criminal offense.

X.

That Count Nine of said information fails to state facts sufficient to constitute a criminal offense.

XI.

That Count Ten of said information fails to state facts sufficient to constitute a criminal offense.

XII.

That Count Eleven of said information fails to state facts sufficient to constitute a criminal offense.

XIII.

That Count Twelve of said information fails to state facts sufficient to constitute a criminal offense.

Wherefore, defendant prays that this demurrer be sustained and the above entitled proceeding dismissed.

WILLIAM KATZ

Attorney for Defendant [21]

Received copy of the within Demurrer this 21st day of July, 1943.

CHARLES H. CARR,

HKM

U. S. Atty.

Attorney for Plaintiff

[Endorsed]: Filed July 21, 1943. [22]

At a stated term, to-wit: The September Term, A. D. 1943, of the District Court of the United States of America, within and for the Central Division of the Southern District of California, held at the Court Room thereof, in the City of Los Angeles on Thursday the 30th day of September in the year of our Lord one thousand nine hundred and forty-three.

Present: The Honorable C. E. Beaumont, District Judge.

[Title of Cause.]

No. 16,107-Crim.

ORDER DENYING MOTION TO QUASH AND SET ASIDE INFORMATION

Motion of the defendant to quash and set aside information, and demurrer of defendant, having heretofore been heard by the Court, and counsel having argued the same and submitted written briefs, and the Court having duly considered the same and being fully advised as to the facts and the law, now denies motion to quash and set aside information, and sustains demurrer, granting leave to the Government to file amended information within ten days. [23]

At a stated term, to-wit: The September Term, A. D. 1943, of the District Court of the United States of America, within and for the Central Division of the Southern District of California, held at the Court Room thereof, in the City of Los Angeles on Monday the 11th day of October in the year of our Lord one thousand nine hundred and forty-three.

Present: The Honorable Ben Harrison, District Judge.

[Title of Cause.]

No. 16107-Crim.

ORDER THAT AMENDED
INFORMATION BE FILED

On motion of Ray H. Kinnison, Esq., Assistant U. S. Attorney, who presents an Amended Information to the Court in this cause, it is ordered that said Amended Information be filed. [24]

This Information contains twelve (12) Counts charging Clarence O. Flannagan with the violation of Revised Maximum Price Regulation No. 169, Revised Maximum Price Regulation No. 239 and Revised Maximum Price Regulation No. 148, issued pursuant to the Emergency Price Control Act of 1942. (The maximum penalty on each Count consists of one (1) year imprisonment and/or a fine of Five Thousand Dollars (\$5,000.00) or both, with no minimum penalty provided).

Clarence O. Flannagan
325 Santa Ana Avenue
Newport Heights, California [25]

[Title of District Court and Cause.]

AMENDED INFORMATION

Comes now Charles H. Carr, United States Attorney in and for the Southern District of California, Central Division, who for the United States and in its behalf, prosecutes in his own proper person, and with leave of Court first had and obtained, gives the Court here to understand and be informed as follows, to-wit: [26]

COUNT ONE

That on or about the 25th day of June, 1943, in the City of Fullerton, County of Orange, State of California, in the District aforesaid and in the Central Division thereof and within the jurisdiction of this Court, the defendant, Clarence O. Flanagan, sold and delivered to Jack Casparie certain beef and pork cuts; that in connection with and as a part of said sale the defendant did knowingly, wilfully and unlawfully and with intent to evade the maximum prices permitted for said cuts, as established by Revised Maximum Price Regulation 169 (7 Fed. Reg. 10381), as amended, and Revised Maximum Price Regulation 148 (7 Fed. Reg. 8609), as amended, issued pursuant to the Emergency Price Control Act of 1942, furnish to Jack Casparie an invoice stating the total price charged for said beef and pork cuts to be \$101.42, whereas in truth and in fact, as the defendant then and there well knew, the total price charged and received by the defendant from Jack Casparie for

said beef and pork cuts was \$127.57, which total price of \$127.57 was in excess of the maximum price permitted for said cuts by said Revised Maximum Price Regulation 169, as amended, and Revised Maximum Price Regulation 148, as amended; contrary to the form of the statute in such case made and provided and against the peace and dignity of the United States (Emergency Price Control Act of 1942, Pub. L. 421, 77th Cong. 2d Sess., 56 Stat. 23, January 30, 1942). [27]

COUNT TWO

That on or about the 4th day of June, 1943, in the City of Fullerton, County of Orange, State of California, in the District aforesaid and in the Central Division thereof and within the jurisdiction of this Court, the defendant, Clarence O. Flannagan, sold and delivered to Jack Casparie certain beef and pork cuts; that in connection with and as a part of said sale the defendant did knowingly, wilfully and unlawfully and with intent to evade the maximum prices permitted for said cuts, as established by Revised Maximum Price Regulation 169 (7 Fed. Reg. 10381), as amended, and Revised Maximum Price Regulation 148 (7 Fed. Reg. 8609), as amended, issued pursuant to the Emergency Price Control Act of 1942, furnish to Jack Casparie an invoice stating the total price charged for said beef and pork cuts to be \$288.27, whereas in truth and in fact, as the defendant then and there well knew, the total price charged and received by the defendant from Jack Casparie for

said beef and pork cuts was \$385.47, which total price of \$385.47 was in excess of the maximum price permitted for said cuts by said Revised Maximum Price Regulation 169, as amended, and Revised Maximum Price Regulation 148, as amended; contrary to the form of the statute in such case made and provided and against the peace and dignity of the United States (Emergency Price Control Act of 1942, Pub. L. 421, 77th Cong. 2d Sess., 56 Stat. 23, January 30, 1942). [28]

COUNT THREE

That on or about the 8th day of June, 1943, in the City of Fullerton, County of Orange, State of California, in the District aforesaid and in the Central Division thereof and within the jurisdiction of this Court, the defendant, Clarence O. Flannagan, sold and delivered to Jack Casparie certain beef and lamb cuts; that in connection with and as a part of said sale the defendant did knowingly, wilfully and unlawfully and with intent to evade the maximum prices permitted for said cuts, as established by Revised Maximum Price Regulation 169 (7 Fed. Reg. 10381), as amended, and Revised Maximum Price Regulation 239 (7 Fed. Reg. 10688), as amended, issued pursuant to the Emergency Price Control Act of 1942, furnish to Jack Casparie an invoice stating the total price charged for said beef and lamb cuts to be \$178.63, whereas in truth and in fact, as the defendant then and there well knew, the total price charged and received by the defendant from Jack Casparie for

said beef and lamb cuts was \$244.03, which total price of \$244.03 was in excess of the maximum price permitted for said cuts by said Revised Maximum Price Regulation 169, as amended, and Revised Maximum Price Regulation 239, as amended; contrary to the form of the statute in such case made and provided and against the peace and dignity of the United States (Emergency Price Control Act of 1942, Pub. L. 421, 77th Cong. 2d Sess., 56 Stat. 23, January 30, 1942). [29]

COUNT FOUR

That on or about the 11th day of June, 1943, in the City of Fullerton, County of Orange, State of California, in the District aforesaid and in the Central Division thereof and within the jurisdiction of this Court, the defendant, Clarence O. Flannagan, sold and delivered to Jack Casparie certain beef and pork cuts; that in connection with and as a part of said sale the defendant did knowingly, wilfully and unlawfully and with intent to evade the maximum prices permitted for said cuts, as established by Revised Maximum Price Regulation 169 (7 Fed. Reg. 10381), as amended, and Revised Maximum Price Regulation 148 (7 Fed. Reg. 8609), as amended, issued pursuant to the Emergency Price Control Act of 1942, furnish to Jack Casparie an invoice stating the total price charged for said beef and pork cuts to be \$448.22, whereas in truth and in fact, as the defendant then and there well knew, the total price charged and received by the defendant from Jack Casparie for said beef and

pork cuts was \$606.22, which total price of \$606.22 was in excess of the maximum price permitted for said cuts by said Revised Maximum Price Regulation 169, as amended, and Revised Maximum Price Regulation 148, as amended; contrary to the form of the statute in such case made and provided and against the peace and dignity of the United States (Emergency Price Control Act of 1942, Pub. L. 421, 77th Cong. 2d Sess., 56 Stat. 23, January 30, 1942). [30]

COUNT FIVE

That on or about the 15th day of June, 1943, in the City of Fullerton, County of Orange, State of California, in the district aforesaid and in the Central Division thereof and within the jurisdiction of this Court, the defendant, Clarence O. Flannagan, sold and delivered to Jack Casparie certain beef and pork cuts; that in connection with and as a part of said sale the defendant did knowingly, wilfully and unlawfully and with intent to evade the maximum prices permitted for said cuts, as established by Revised Maximum Price Regulation 169 (7 Fed. Reg. 10381), as amended, and Revised Maximum Price Regulation 148 (7 Fed. Reg. 8609), as amended, issued pursuant to the Emergency Price Control Act of 1942, furnish to Jack Casparie an invoice stating the total price charged for said beef and pork cuts to be \$54.94, whereas in truth and in fact, as the defendant then and there well knew, the total price charged and received by the defendant from Jack Casparie for said beef and pork cuts was \$69.19, which total price of \$69.19 was in excess

of the maximum price permitted for said cuts by said Revised Maximum Price Regulation 169, as amended, and Revised Maximum Price Regulation 148, as amended; contrary to the form of the statute in such case made and provided and against the peace and dignity of the United States (Emergency Price Control Act of 1942, Pub. L. 421, 77th Cong. 2d Sess., 56 Stat. 23, January 30, 1942). [31]

COUNT SIX

That on or about the 1st day of July, 1943, in the City of Fullerton, County of Orange, State of California, in the District aforesaid and in the Central Division thereof and within the jurisdiction of this Court, the defendant, Clarence O. Flannagan, sold and delivered to Jack Casparie certain beef, pork and lamb cuts; that in connection with and as a part of said sale the defendant did knowingly, wilfully and unlawfully and with intent to evade the maximum prices permitted for said cuts, as established by Revised Maximum Price Regulation 169 (7 Fed. Reg. 10381), as amended, Revised Maximum Price Regulation 148 (7 Fed. Reg. 8609) as amended, and Revised Maximum Price Regulation 239 (7 Fed. Reg. 10688), as amended, issued pursuant to the Emergency Price Control Act of 1942, furnish to Jack Casparie an invoice stating the total price charged for said beef, pork and lamb cuts to be \$450.51, whereas in truth and in fact, as the defendant then and there well knew, the total price charged and received by the defendant from Jack Casparie

for said beef, pork and lamb cuts was \$609.41, which total price of \$609.41 was in excess of the maximum price permitted for said cuts by said Revised Maximum Price Regulation 169, as amended, Revised Maximum Price Regulation No. 148, as amended, and Revised Maximum Price Regulation 239, as amended; contrary to the form of the statute in such case made and provided and against the peace and dignity of the United States (Emergency Price Control Act of 1942, Pub. L. 421, 77th Cong. 2d Sess., 56 Stat. 23, January 30, 1942). [32]

COUNT SEVEN

That on or about the 2nd day of July, 1943, in the City of Fullerton, County of Orange, State of California, in the District aforesaid and in the Central Division thereof and within the jurisdiction of this Court, the defendant, Clarence O. Flannagan, sold and delivered to Jack Casparie certain beef, pork and lamb cuts; that in connection with and as a part of said sale the defendant did knowingly, wilfully and unlawfully and with intent to evade the maximum prices permitted for said cuts, as established by Revised Maximum Price Regulation 169 (7 Fed. Reg. 10381), as amended, Revised Maximum Price Regulation 148 (7 Fed. Reg. 8609), as amended, and Revised Maximum Price Regulation 239 (7 Fed. Reg. 10688), as amended, issued pursuant to the Emergency Price Control Act of 1942, furnish to Jack Casparie an invoice stating the total price charged for said beef, pork and lamb cuts to be \$367.86, whereas in truth and in fact,

as the defendant then and there well knew, the total price charged and received by the defendant from Jack Casparie for said beef, pork and lamb cuts was \$537.18, which total price of \$537.18 was in excess of the maximum price permitted for said cuts by said Revised Maximum Price regulation 169, as amended, Revised Maximum Price Regulation No. 148, as amended, and Revised Maximum Price Regulation 239, as amended; contrary to the form of the statute in such case made and provided and against the peace and dignity of the United States (Emergency Price Control Act of 1942, Pub. L. 421, 77th Cong. 2d Sess., 56 Stat. 23, January 30, 1942). [33]

COUNT EIGHT

That on or about the 3rd day of June, 1943, in the City of Anaheim, County of Orange, State of California, in the District aforesaid and in the Central Division thereof and within the jurisdiction of this Court, the defendant, Clarence O. Flannagan, violated the provisions of Section 1364.401 of Revised Maximum Price Regulation 169 (7 Fed. Reg. 10381), as amended, issued pursuant to Section 2 of the Emergency Price Control Act of 1942, in that he did knowingly, wilfully and unlawfully offer for sale, sell and deliver to R. H. Richards, doing business as Rich's Market, Anaheim, California, one beef carcass, U. S. Grade A, weighing 640 pounds, for the sum of \$225.83; that the maximum price permitted under said Revised Maximum Price Regulation 169, as amended, for said beef carcass, U. S. Grade A, weighing 640 pounds was

\$155.20; contrary to the form of the statute in such case made and provided and against the peace and dignity of the United States. (Emergency Price Control Act of 1942, Pub. L. 421, 77th Cong. 2d Sess., 56 Stat. 23, January 30, 1942). [34]

COUNT NINE

That on or about the 7th day of June, 1943, in the City of Anaheim, County of Orange, State of California, in the District aforesaid and in the Central Division thereof and within the jurisdiction of this Court, the defendant, Clarence O. Flannagan, sold and delivered to R. H. Richards, doing business as Rich's Market, Anaheim, California, certain beef and pork cuts; that in connection with and as a part of said sale the defendant did knowingly, wilfully and unlawfully and with intent to evade the maximum prices permitted for said cuts, as established by Revised Maximum Price Regulation 169 (7 Fed. Reg. 10381), as amended, and Revised Maximum Price Regulation 148 (7 Fed. Reg. 8609), as amended, issued pursuant to the Emergency Price Control Act of 1942, furnish to R. H. Richards, doing business as Rich's Market, Anaheim, California, an invoice stating the total price charged for said beef and pork cuts to be \$192.53, whereas in truth and in fact, as the defendant then and there well knew, the total price charged and received by the defendant from R. H. Richards, doing business as Rich's Market, for said beef and pork cuts was \$281.15, which total price of \$281.15 was in excess of the maximum price permitted for

said cuts by said Revised Maximum Price Regulation 169, as amended, and Revised Maximum Price Regulation 148, as amended; contrary to the form of the statute in such case made and provided and against the peace and dignity of the United States (Emergency Price Control Act of 1942, Pub. L. 421, 77th Cong. 2d Sess., 56 Stat. 23, January 30, 1942). [35]

COUNT TEN

That on or about the 25th day of June, 1943, in the City of Anaheim, County of Orange, State of California, in the District aforesaid and in the Central Division thereof, and within the jurisdiction of this Court, Clarence O. Flannagan violated the provisions of Section 1364.401 of Revised Maximum Price Regulation 169 (7 Fed. Reg. 10381), as amended, issued pursuant to Section 2 of the Emergency Price Control Act of 1942, in that he did knowingly, wilfully and unlawfully offer for sale, sell and deliver to James R. Kilduff, doing business as Kilduff's Market, Anaheim, California, one side of beef, U. S. Grade A, weighing 564 pounds, for the price of 29¼¢ per pound; that the maximum price permitted under said Revised Maximum Price Regulation 169, as amended, for said side of beef, U. S. Grade A, weighing 564 pounds, was 22¼¢ per pound; contrary to the form of the statute in such case made and provided and against the peace and dignity of the United States of America (Emergency Price Control Act of 1942, Pub. L. 421, 77th Cong. 2d Sess., 56 Stat. 23, January 30, 1942). [36]

COUNT ELEVEN

That on or about the 28th day of June, 1943, in the City of Anaheim, County of Orange, State of California, in the District aforesaid and in the Central Division thereof, and within the jurisdiction of this Court, Clarence O. Flannagan violated the provisions of Section 1364.401 of Revised Maximum Price Regulation 169 (7 Fed. Reg. 10381), as amended, issued pursuant to Section 2 of the Emergency Price Control Act of 1942, in that he did knowingly, wilfully and unlawfully offer for sale, sell and deliver to James R. Kilduff, doing business as Kilduff's Market, Anaheim, California, one U. S. Grade B beef carcass, weighing 425 pounds, for the price of 27 $\frac{1}{4}$ c per pound; that the maximum price permitted under said Revised Maximum Price Regulation 169, as amended, for said U. S. Grade B beef carcass, weighing 425 pounds, was 20 $\frac{1}{4}$ c per pound; contrary to the form of the statute in such case made and provided and against the peace and dignity of the United States of America (Emergency Price Control Act of 1942, Pub. L. 421, 77th Cong. 2d Sess., 56 Stat. 23, January 30, 1942). [37]

COUNT TWELVE

That on or about the 1st day of July, 1943, in the City of Anaheim, County of Orange, State of California, in the District aforesaid and in the Central Division thereof and within the jurisdiction of this Court, the defendant, Clarence O. Flannagan, sold and delivered to L. M. Pickel, doing business as

Pickel's, Anaheim, California, certain beef and lamb cuts; that in connection with and as a part of said sale the defendant did knowingly, wilfully and unlawfully and with intent to evade the maximum prices permitted for said cuts, as established by Revised Maximum Price Regulation 169 (7 Fed. Reg. 10381), as amended, and Revised Maximum Price Regulation 239 (7 Fed. Reg. 10688), as amended, issued pursuant to the Emergency Price Control Act of 1942, furnished to L. M. Pickel, doing business as Pickel's, an invoice stating the total price charged for said beef and lamb cuts to be \$38.93, whereas in truth and in fact, as the defendant then and there well knew, the total price charged and received by the defendant from L. M. Pickel, doing business as Pickel's, for said beef and lamb cuts was \$52.77, which total price of \$52.77 was in excess of the maximum price permitted for said cuts by said Revised Maximum Price Regulation 169, as amended, and Revised Maximum Price Regulation 239, as amended; contrary to the form of the statute in such case made and provided and against the peace and dignity of the United States (Emergency Price Control Act of 1942, Pub. L. 421, 77th Cong. 2d Sess., 56 Stat. 23, January 30, 1942).

Wherefore, said United States Attorney prays that process of this Court be issued against Clarence

O. Flannagan and that he be dealt with according to law.

CHARLES H. CARR

United States Attorney

By CHARLES H. VEALE

Assistant United States At-
torney [38]

VERIFICATION

State of California

County of Los Angeles

United States of America—ss.

Stanley Gorman, being first duly sworn, upon oath deposes and says:

That he is an employee of the United States Government, to-wit, an Investigator for the Office of Price Administration, an agency of the United States Government; that in the course of his duty as Investigator for the Office of Price Administration he made an investigation of the matters set forth and mentioned in the foregoing Information against Clarence O. Flannagan; that he has read the above and foregoing Information and knows the contents thereof and that the matters set forth therein are true of his own knowledge.

STANLEY GORMAN

Subscribed and sworn to this 9 day of October, 1943, before me, Edmund L. Smith, Clerk, United States District Court.

By IRWIN HAMES

[Endorsed]: Filed Oct. 11, 1943. [39]

[Title of District Court and Cause.]

NOTICE OF MOTION TO QUASH AND SET
ASIDE AMENDED INFORMATION

To the United States of America and Charles H.
Carr, Its Attorney:

You and Each of You Will Please Take Notice that the defendant herein, Clarence O. Flannagan, by and through his attorney, William Katz, will move the above entitled Court in Courtroom 6 thereof, Federal Building, Los Angeles, on Monday, October 18, 1943, at the hour of 10:00 A.M. thereof or as soon thereafter as counsel may be heard, to quash and set aside the amended information and each count thereof filed by plaintiff herein.

Said motion will be made upon the grounds that said amended information and each count thereof fails to state facts sufficient to constitute a criminal offense and that the laws, rules and regulations upon which said information purports to be based are arbitrary, discriminatory, unreasonable, invalid, unconstitutional and void. [40]

Said motion will be based upon this notice of motion, the amended information filed herein and the law governing.

Dated this 15th day of October, 1943.

WILLIAM KATZ

Attorney for Defendant.

[Endorsed]: Filed Oct. 16, 1943. [41]

[Title of District Court and Cause.]

DEMURRER TO AMENDED INFORMATION

Comes now Clarence O. Flannagan, defendant herein, by and through his attorney, William Katz, and demurs to the amended information filed by plaintiff herein upon the following grounds:

I.

That said information fails to state facts sufficient to constitute a criminal offense.

II.

That Count One of said information fails to state facts sufficient to constitute a criminal offense.

III.

That Count Two of said information fails to state facts sufficient to constitute a criminal offense.

IV.

That Count Three of said information fails to state facts sufficient to constitute a criminal offense.

[42]

V.

That Count Four of said information fails to state facts sufficient to constitute a criminal offense.

VI.

That Count Five of said information fails to state facts sufficient to constitute a criminal offense.

VII.

That Count Six of said information fails to state facts sufficient to constitute a criminal offense.

VIII.

That Count Seven of said information fails to state facts sufficient to constitute a criminal offense.

IX.

That Count Eight of said information fails to state facts sufficient to constitute a criminal offense.

X.

That Count Nine of said information fails to state facts sufficient to constitute a criminal offense.

XI.

That Count Ten of said information fails to state facts sufficient to constitute a criminal offense.

XII.

That Count Eleven of said information fails to state facts sufficient to constitute a criminal offense.

XIII.

That Count Twelve of said information fails to state facts sufficient to constitute a criminal offense.

XIV.

That Count One of the amended information is uncertain in that it cannot be determined therefrom:

(a) What crime, if any, defendant is alleged to have committed; [43]

(b) What grade of beef defendant is alleged to have sold and whether such beef was a "beef carcass" or a beef cut or beef cuts, and if a beef cut or beef cuts, the kind or type of cut or cuts;

(c) What the maximum price is, was or is claimed to be or have been for the beef alleged to have been sold by defendant;

(d) Whether the sale of the beef alleged to have been sold by defendant was made by defendant as a "wholesaler", "peddler truck sale", "independent wholesaler", "hotel supply house", "slaughterer", "packer" or otherwise;

(e) Whether the sale alleged to have been made by defendant was made to a wholesaler, retailer, purveyor of meals or otherwise;

(f) What grade, type or kind *or* pork cuts defendant is alleged to have sold;

(g) What the maximum price is, was or is claimed to be or have been for the pork cuts alleged to have been sold by defendant;

(h) Whether the sale of the pork cuts alleged to have been sold by defendant was made by defendant as a "wholesaler", "peddler truck sale", "certified hog processor", "hotel supply house", "packer" or otherwise;

(i) Whether the sale of the pork cuts alleged to have been made by defendant was made to a wholesaler, retailer, purveyor of meals or otherwise;

(j) In what respect, if any, the purported crime attempted to be alleged in said count One differs from the type or kind of purported crime attempted to be alleged in Counts Eight, Ten and Eleven of said amended information.

XV.

That Count One of the amended information is

indefinite [44] in each and all of the respects in which it is set forth to be uncertain.

XVI.

That Count One of said amended information is ambiguous in each and all of the respects in which it is set forth to be uncertain and indefinite.

XVII.

That Count Two of the amended information is uncertain in that it cannot be determined therefrom:

(a) What crime, if any, defendant is alleged to have committed;

(b) What grade of beef defendant is alleged to have sold and whether such beef was a "beef carcass" or a beef cut or beef cuts, and if a beef cut or beef cuts, the kind or type of cut or cuts;

(c) What the maximum price is, was or is claimed to be or have been for the beef alleged to have been sold by defendant;

(d) Whether the sale of the beef alleged to have been sold by defendant was made by defendant as a "wholesaler", "peddler truck sale", "independent wholesaler", "hotel supply house", "slaughterer", "packer" or otherwise;

(e) Whether the sale alleged to have been made by defendant was made to a wholesaler, retailer, purveyor of meals or otherwise;

(f) What grade, type or kind of pork cuts defendant is alleged to have sold;

(g) What the maximum price is, was or is

claimed to be or have been for the pork cuts alleged to have been sold by defendant;

(h) Whether the sale of the pork cuts alleged to have been sold by defendant was made by defendant as a “wholesaler”, “peddler truck sale”, “certified hog processor”, “hotel supply house”, [45] “packer” or otherwise;

(i) Whether the sale of the pork cuts alleged to have been made by defendant was made to a wholesaler, retailer, purveyor of meals or otherwise;

(j) In what respect, if any, the purported crime attempted to be alleged in said Count Two differs from the type or kind of purported crime attempted to be alleged in Counts Eight, Ten and Eleven of said amended information.

XVIII.

That Count Two of the amended information is indefinite in each and all of the respects in which it is set forth to be uncertain.

XIX.

That Count Two of said amended information is ambiguous in each and all of the respects in which it is set forth to be uncertain and indefinite.

XX.

That Count Three of the amended information is uncertain in that it can not be determined therefrom:

(a) What crime, if any, defendant is alleged to have committed;

(b) What grade of beef defendant is alleged to have sold and whether such beef was a "beef carcass" or a beef cut or beef cuts, and if a beef cut or beef cuts, the kind or type of cut or cuts;

(c) What the maximum price is, was or is claimed to be or have been for the beef alleged to have been sold by defendant;

(d) Whether the sale of the beef alleged to have been sold by defendant was made by defendant as a "wholesaler", "peddler truck sale", "independent wholesaler", "hotel supply house", "slaughterer", "packer" or otherwise; [46]

(e) Whether the sale alleged to have been made by defendant was made to a wholesaler, retailer, purveyor of meals or otherwise;

(f) What grade, type or kind of lamb cuts defendant is alleged to have sold;

(g) What the maximum price is, was or is claimed to be or have been for the lamb cuts alleged to have been sold by defendant;

(h) Whether the lamb cuts alleged to have been sold by defendant were sold by him as a "wholesaler", "peddler truck sale", "hotel supply house", "packer" or otherwise;

(i) Whether the lamb cuts alleged to have been sold by defendant were sold to a wholesaler, retailer, purveyor of meals or otherwise;

(j) In what respect, if any, the purported crime attempted to be alleged in said Count Three differs from the type or kind of purported crime attempted to be alleged in Counts Eight, Ten and Eleven of said amended information.

XXI.

That Count Three of the amended information is indefinite in each and all of the respects in which it is set forth to be uncertain.

XXII.

That Count Three of said amended information is ambiguous in each and all of the respects in which it is set forth to be uncertain and indefinite.

XXIII.

That Count Four of the amended information is uncertain in that it cannot be determined therefrom:

(a) What crime, if any, defendant is alleged to have committed;

(b) What grade of beef defendant is alleged to have [47] sold and whether such beef was a "beef carcass" or a beef cut or beef cuts, and if a beef cut or beef cuts, the kind or type of cut or cuts;

(c) What the maximum price is, was or is claimed to be or have been for the beef alleged to have been sold by defendant;

(d) Whether the sale of the beef alleged to have been sold by defendant was made by defendant as a "wholesaler", "peddler truck sale", "independent wholesaler", "hotel supply house", "slaughterer", "packer" or otherwise;

(e) Whether the sale alleged to have been made by defendant was made to a wholesaler, retailer, purveyor of meals or otherwise;

(f) What grade, type or kind of pork cuts defendant is alleged to have sold;

(g) What the maximum price is, was or is claimed to be or have been for the pork cuts alleged to have been sold by defendant;

(h) Whether the sale of the pork cuts alleged to have been sold by defendant was made by defendant as a “wholesaler”, “peddler truck sale”, “certified hog processor”, “hotel supply house”, “packer” or otherwise;

(i) Whether the sale of the pork cuts alleged to have been made by defendant was made to a wholesaler, retailer, purveyor of meals or otherwise;

(j) In what respect, if any, the purported crime attempted to be alleged in said Count Four differs from the type or kind of purported crime attempted to be alleged in Counts Eight, Ten and Eleven of said amended information.

XXIV.

That Count Four of the amended information is indefinite in each and all of the respects in which it is set forth to be uncertain. [48]

XXV.

That Count Four of said amended information is ambiguous in each and all of the respects in which it is set forth to be uncertain and indefinite.

XXVI.

That Count Five of the amended information is uncertain in that it cannot be determined therefrom:

(a) What crime, if any, defendant is alleged to have committed;

(b) What grade of beef defendant is alleged to have sold and whether such beef was a "beef carcass" or a beef cut or beef cuts, and if a beef cut or beef cuts, the kind or type of cut or cuts.

(c) What the maximum price is, was or is claimed to be or have been for the beef alleged to have been sold by defendant;

(d) Whether the sale of the beef alleged to have been sold by defendant was made by defendant as a "wholesaler", "peddler truck sale", "independent wholesaler", "hotel supply house", slaughterer", "packer" or otherwise;

(e) Whether the sale alleged to have been made by defendant was made to a wholesaler, retailer, purveyor of meals or otherwise;

(f) What grade, type or kind of pork cuts defendant is alleged to have sold;

(g) What the maximum price is, was or is claimed to be or have been for the pork cuts alleged to have been sold by defendant;

(h) Whether the sale of the pork cuts alleged to have been sold by defendant was made by defendant as a "wholesaler", "peddler truck sale", "certified hog processor", "hotel supply house", "packer" or otherwise; [49]

(i) Whether the sale of the pork cuts alleged to have been made by defendant was made to a wholesaler, retailer, purveyor of meals or otherwise;

(j) In what respect, if any, the purported crime attempted to be alleged in said Count Five differs from the type or kind of purported crime attempted

to be alleged in Counts Eight, Ten and Eleven of said amended information.

XXVII.

That Count Five of the amended information is indefinite in each and all of the respects in which it is set forth to be uncertain.

XXVIII.

That Count Five of the amended information is ambiguous in each and all of the respects in which it is set forth to be uncertain and indefinite.

XXIX.

That Count Six of the amended information is uncertain in that it cannot be determined therefrom:

(a) What crime, if any, defendant is alleged to have committed;

(b) What grade of beef defendant is alleged to have sold and whether such beef was a "beef carcass" or a beef cut or beef cuts, and if a beef cut or beef cuts, the kind or type of cut or cuts;

(c) What the maximum price is, was or is claimed to be or have been for the beef alleged to have been sold by defendant;

(d) Whether the sale of the beef alleged to have been sold by defendant was made by defendant as a "wholesaler", "peddler truck sale", "independent wholesaler", "hotel supply house", "slaughterer", "packer" or otherwise;

(e) Whether the sale alleged to have been made

by de- [50] fendant was made to a wholesaler, retailer, purveyor of meals or otherwise;

(f) What grade, type or kind of pork cuts defendant is alleged to have sold;

(g) What the maximum price is, was or is claimed to be or have been for the pork cuts alleged to have been sold by defendant;

(h) Whether the sale of the pork cuts alleged to have been sold by defendant was made by defendant as a "wholesaler", "peddler truck sale", "certified hog processor", "hotel supply house", "packer" or otherwise;

(i) Whether the sale of the pork cuts alleged to have been made by defendant was made to a wholesaler, retailer, purveyor of meals or otherwise;

(j) What grade, type or kind of lamb cuts defendant is alleged to have sold;

(k) What the maximum price is, was or is claimed to be or have been for the lamb cuts alleged to have been sold by defendant;

(l) Whether the lamb cuts alleged to have been sold by defendant were sold by him as a "wholesaler", "peddler truck sale", "hotel supply house", "packer" or otherwise;

(m) Whether the lamb cuts alleged to have been sold by defendant were sold by defendant to a wholesaler, retailer, purveyor of meals or otherwise;

(n) In what respect, if any, the purported crime attempted to be alleged in said Count Six

differs from the type or kind of purported crime attempted to be alleged in Counts Eight, Ten and Eleven of said amended information.

XXX.

That Count Six of the amended information is indefinite in each and all of the respects in which it is set forth to be un- [51] certain.

XXXI.

That Count Six of said amended information is ambiguous in each and all of the respects in which it is set forth to be uncertain and indefinite.

XXXII.

That Count Seven of the amended information is uncertain in that it cannot be determined therefrom:

(a) What crime, if any, defendant is alleged to have committed;

(b) What grade of beef defendant is alleged to have sold and whether such beef was a "beef carcass" or a beef cut or beef cuts, and if a beef cut or beef cuts, the kind or type of cut or cuts;

(c) What the maximum price is, was or is claimed to be or have been for the beef alleged to have been sold by defendant;

(d) Whether the sale of the beef alleged to have been sold by defendant was made by defendant as a "wholesaler", "peddler truck sale", "independent wholesaler", "hotel supply house", "Slaughterer", "packer" or otherwise;

(e) Whether the sale alleged to have been made

by defendant was made to a wholesaler, retailer, purveyor of meals or otherwise;

(f) What grade, type or kind of pork cuts defendant is alleged to have sold;

(g) What the maximum price is, was or is claimed to be or have been for the pork cuts alleged to have been sold by defendant;

(h) Whether the sale of the pork cuts alleged to have been sold by defendant was made by defendant as a "wholesaler", "peddler truck sale", "certified hog processor", "hotel supply house", "packer" or otherwise; [52]

(i) Whether the sale of the pork cuts alleged to have been made by defendant was made to a wholesaler, retailer, purveyor of meals or otherwise;

(j) What grade, type or kind of lamb cuts defendant is alleged to have sold;

(k) What the maximum price is, was or is claimed to be or have been for the lamb cuts alleged to have been sold by defendant;

(l) Whether the lamb cuts alleged to have been sold by defendant were sold by him as a "wholesaler", "peddler truck sale", "hotel supply house", "packer" or otherwise;

(m) Whether the lamb cuts alleged to have been sold by defendant were sold by defendant to a wholesaler, retailer, purveyor of meals or otherwise;

(n) In what respect, if any, the purported crime attempted to be alleged in said Count Seven differs from the type or kind of purported crime

attempted to be alleged in Counts Eight, Ten and Eleven of said amended information.

XXXIII.

That Count Seven of the amended information is indefinite in each and all of the respects in which it is heretofore set forth to be uncertain.

XXXIV.

That Count Seven of said amended information is ambiguous in each and all of the respects in which it is set forth to be uncertain and indefinite.

XXXV.

That Count Eight of the amended information is uncertain in that it cannot be determined therefrom:

(a) What crime, if any, defendant is alleged to have committed; [53]

(b) Whether the sale of the beef alleged to have been sold by defendant was made by defendant as a "wholesaler", "peddler truck sale", "independent wholesaler", "hotel supply house", "slaughterer", "packer" or otherwise;

(c) Whether the sale alleged to have been made by defendant was made to a wholesaler, retailer, purveyor of meals or otherwise;

(d) In what respects, if any, the purported crime attempted to be alleged in said Count Eight differs from the purported crimes attempted to be alleged in Counts One, Two, Three, Four, Five, Six, Seven, Nine and Twelve of said amended information.

XXXVI.

That Count Eight of the amended information is indefinite in each and all of the respects in which it is heretofore set forth to be uncertain.

XXXVII.

That Count Eight of the said amended information is ambiguous in each and all of the respects in which it is heretofore set forth to be uncertain and indefinite.

XXXVIII.

That Count Nine of the amended information is uncertain in that it cannot be determined therefrom:

(a) What crime, if any, defendant is alleged to have committed;

(b) What grade of beef defendant is alleged to have sold and whether such beef was a "beef carcass" or a beef cut or beef cuts, and if a beef cut or beef cuts, the kind or type of cut or cuts;

(c) What the maximum price is, was or is claimed to be or have been for the beef alleged to have been sold by defendant;

(d) Whether the sale of the beef alleged to have been sold by defendant was made by defendant as a "wholesaler", "peddler [54] truck sale", "independent wholesaler", "hotel supply house", "slaughterer", "packer" or otherwise;

(e) Whether the sale alleged to have been made by defendant was made to a wholesaler, retailer, purveyor of meals or otherwise;

(f) What grade, type or kind of pork cuts defendant is alleged to have sold;

(g) What the maximum price is, was or is claimed to be or have been for the pork cuts alleged to have been sold by defendant;

(h) Whether the sale of the pork cuts alleged to have been sold by defendant was made by defendant as a "wholesaler", "peddler truck sale", "certified hog processor", "hotel supply house", "packer" or otherwise;

(i) Whether the sale of the pork cuts alleged to have been made by defendant was made to a wholesaler, retailer, purveyor of meals or otherwise;

(j) In what respect, if any, the purported crime attempted to be alleged in said Count Nine differs from the type or kind of purported crime attempted to be alleged in Counts Eight, Ten and Eleven of said amended information.

XXXIX.

That Count Nine of the amended information is indefinite in each and all of the respects in which it is heretofore set forth to be uncertain.

XXXX.

That Count Nine of said amended information is ambiguous in each and all of the respects in which it is heretofore set forth to be uncertain and indefinite.

XXXXI.

That Count Ten of the amended information is uncertain in that it cannot be determined therefrom: [55]

(a) What crime, if any, defendant is alleged to have committed;

(b) Whether the sale of the beef alleged to have been sold by defendant was made by defendant as a "wholesaler", "peddler truck sale", "independent wholesaler", "hotel supply house", "slaughterer", "packer" or otherwise;

(c) Whether the sale alleged to have been made by defendant was made to a wholesaler, retailer, purveyor of meals or otherwise;

(d) In what respects, if any, the purported crime attempted to be alleged in said Count Ten differs from the purported crimes attempted to be alleged in Counts, One, Two, Three, Four, Five, Six, Seven, Nine and Twelve of said amended information.

XXXXII.

That Count Ten of the amended information is indefinite in each and all of the respects in which it is heretofore set forth to be uncertain.

XXXXIII.

That Count Ten of said amended information is ambiguous in each and all of the respects in which it is heretofore set forth to be uncertain and indefinite.

XXXXIV.

That Count Eleven of the amended information is uncertain in that it cannot be determined therefrom:

(a) What crime, if any, defendant is alleged to have committed;

(b) Whether the sale of the beef alleged to have been sold by defendant was made by defendant as a "wholesaler", "peddler truck sale", "independent wholesaler", "hotel supply house", "slaughterer", "packer" or otherwise;

(c) Whether the sale alleged to have been made by defendant was made to a wholesaler, retailer, purveyor of meals or [56] otherwise;

(d) In what respects, if any, the purported crime attempted to be alleged in said Count Eleven differs from the purported crimes attempted to be alleged in Counts One, Two, Three, Four, Five, Six, Seven, Nine and Twelve of said amended information.

XXXXV.

That Count Eleven of the amended information is indefinite in each and all of the respects in which it is heretofore set forth to be uncertain.

XXXXVI.

That Count Eleven of the said amended information is ambiguous in each and all of the respects in which it is heretofore set forth to be uncertain and indefinite.

XXXXVII.

That Count Twelve of the amended information is uncertain in that it cannot be determined therefrom:

(a) What crime, if any, defendant is alleged to have committed;

(b) What grade of beef defendant is alleged to have sold and whether such beef was a "beef

carcass” or a beef cut or beef cuts, and if a beef cut or beef cuts, the kind or type of cut or cuts;

(c) What the maximum price is, was or is claimed to be or have been for the beef alleged to have been sold by defendant;

(d) Whether the sale of the beef alleged to have been sold by defendant was made by defendant as a “wholesaler”, “peddler truck sale”, “independent wholesaler”, “hotel supply house”, “slaughterer”, “packer” or otherwise;

(e) Whether the sale alleged to have been made by defendant was made to a wholesaler, retailer, purveyor of meals or otherwise;

(f) What grade, type or kind of lamb cuts defendant [57] is alleged to have sold;

(g) What the maximum price is, was or is claimed to be or have been for the lamb cuts alleged to have been sold by defendant;

(h) Whether the lamb cuts alleged to have been sold by defendant were sold by him as a “wholesaler”, “peddler truck sale”, “hotel supply house”, “packer” or otherwise;

(i) Whether the lamb cuts alleged to have been sold by defendant were sold to a wholesaler, retailer, purveyor of meals or otherwise;

(j) In what respect, if any, the purported crime attempted to be alleged in said Count Twelve differs from the type or kind of purported crime attempted to be alleged in Counts Eight, Ten and Eleven of said amended information.

XXXXVIII.

That Count Twelve is indefinite in each and all

of the respects in which it is heretofore set forth to be uncertain.

XXXXIX.

That Count Twelve of the said amended information is ambiguous in each and all of the respects in which it is heretofore set forth to be uncertain and indefinite.

Wherefore, defendant prays that this demurrer be sustained and the above entitled proceeding dismissed.

WILLIAM KATZ

Attorney for Defendant.

[Endorsed]: Filed Oct. 16, 1943. [58]

At a stated term, to-wit: The September Term, A. D. 1943, of the District Court of the United States of America, within and for the Central Division of the Southern District of California, held at the Court Room thereof, in the City of Los Angeles on Monday the 18th day of October in the year of our Lord one thousand nine hundred and forty-three.

Present: The Honorable Ben Harrison, District Judge.

[Title of Cause.]

No. 16,107-Crim.

ORDER DENYING MOTION TO QUASH
AND OVERRULE DEMURRER

This cause coming on for hearing on motion to quash and demurrer, and for arraignment and plea of the defendant Clarence O. Flannagan, to the

amended Information; Ray H. Kinnison, Esq., Assistant *U. S. appearing* for the Government; William Katz, Esq., appearing as counsel for the defendant; Virginia Pickering, Court Reporter, being present and reporting the proceedings; the defendant being present in Court on bond;

Attorney Katz makes a statement and argues the motion to quash and demurrer. The Court orders the motion to quash denied and demurrer overruled, and an exception is allowed to the defendant.

The defendant enters plea of not guilty to each of the 12 counts of the amended Information, and it is ordered that this cause be, and it hereby is set for trial for November 9, 1943, at 9:30 A. M. [59]

[Title of District Court and Cause.]

NOTICE OF MOTION FOR
BILL OF PARTICULARS

To the United States of America, plaintiff herein,
and Charles H. Carr, its attorney:

You and each of you will please take notice that the defendant herein, Clarence O. Flannagan, by and through his attorney, William Katz, will move the above entitled Court in Courtroom 6 thereof, Federal Building, Los Angeles, California, on Monday, November 1, 1943, at the hour of 10:00 A. M. thereof, or as soon thereafter as counsel may be heard, to order the plaintiff to furnish and deliver to defendant herein within five days, a bill of particulars stating the facts respecting each of the matters hereinafter enumerated as to each of the

twelve counts of the amended information as follows:

COUNTS I, II, IV, V, IX

(a) What grade of beef defendant is alleged to have sold and whether such beef was a "beef carcass" or a beef cut or [60] beef cuts, and if a beef cut or beef cuts, the kind or type of cut or cuts;

(b) What the maximum price is, was or is claimed to be or have been for the beef alleged to have been sold by defendant;

(c) Whether the sale of the beef alleged to have been sold by defendant was made by defendant as a "wholesaler", "peddler truck sale", "independent wholesaler", "hotel supply house", "slaughterer", "packer" or otherwise;

(d) Whether the sale alleged to have been made by defendant was made to a wholesaler, retailer, purveyor of meals or otherwise;

(e) What grade, type or kind of pork cuts defendant is alleged to have sold;

(f) What the maximum price is, was or is claimed to be or have been for the pork cuts alleged to have been sold by defendant;

(g) Whether the sale of the pork cuts alleged to have been sold by defendant was made by defendant as a "wholesaler", "peddler truck sale", "certified hog processor", "hotel supply house", "packer" or otherwise;

(h) Whether the sale of the pork cuts alleged to have been made by defendant was made to a

wholesaler, retailer, purveyor of meals or otherwise;

COUNTS III and XII.

(a) What grade of beef defendant is alleged to have sold and whether such beef was a "beef carcass" or a beef cut or beef cuts, and if a beef cut or beef cuts, the kind or type of cut or cuts;

(b) What the maximum price is, was or is claimed to be or have been for the beef alleged to have been sold by defendant;

(c) Whether the sale of the beef alleged to have been [61] sold by defendant was made by defendant as a "wholesaler", "peddler truck sale", "independent wholesaler", "hotel supply house", "slaughterer", "packer" or otherwise;

(d) Whether the sale alleged to have been made by defendant was made to a wholesaler, retailer, purveyor of meals or otherwise;

(e) What grade, type or kind of lamb cuts defendant is alleged to have sold;

(f) What the maximum price is, was or is claimed to be or have been for the lamb cuts alleged to have been sold by defendant;

(g) Whether the lamb cuts alleged to have been sold by defendant were sold by him as a "wholesaler", "peddler truck sale", "hotel supply house", "packer" or otherwise;

(h) Whether the lamb cuts alleged to have been sold by defendant were sold to a wholesaler, retailer, purveyor of meals or otherwise;

COUNTS VI and VII.

(a) What grade of beef defendant is alleged to have sold and whether such beef was a "beef carcass" or a beef cut or beef cuts, and if a beef cut or beef cuts, the kind or type of cut or cuts;

(b) What the maximum price is, was or is claimed to be or have been for the beef alleged to have been sold by defendant;

(c) Whether the sale of the beef alleged to have been sold by defendant was made by defendant as a "wholesaler", "peddler truck sale", "independent wholesaler", "hotel supply house", "slaughterer", "packer" or otherwise;

(d) Whether the sale alleged to have been made by defendant was made to a wholesaler, retailer, purveyor of meals or otherwise; [62]

(e) What grade, type or kind of pork cuts defendant is alleged to have sold;

(f) What the maximum price is, was or is claimed to be or have been for the pork cuts alleged to have been sold by defendant;

(g) Whether the sale of the pork cuts alleged to have been sold by defendant was made by defendant as a "wholesaler", "peddler truck sale", "certified hog processor", "hotel supply house", "packer" or otherwise;

(h) Whether the sale of the pork cuts alleged to have been made by defendant was made to a wholesaler, retailer, purveyor of meals or otherwise;

(i) What grade, type or kind of lamb cuts defendant is alleged to have sold;

(j) What the maximum price is, was or is claimed to be or have been for lamb cuts alleged to have been sold by defendant;

(k) Whether the lamb cuts alleged to have been sold by defendant were sold by him as a "wholesaler", "peddler truck sale", "hotel supply house", "packer" or otherwise;

(l) Whether the lamb cuts alleged to have been sold by defendant were sold by defendant to a wholesaler, retailer, purveyor of meals or otherwise.

COUNTS VIII, X and XI.

(a) What grade beef defendant is alleged to have sold and whether such beef was a "beef carcass" or a beef cut or beef cuts, and if a beef cut or beef cuts, the kind or type of cut or cuts;

(b) What the maximum price is, was or is claimed to be or have been for the beef alleged to have been sold by defendant;

(c) Whether the sale of the beef alleged to have been sold by defendant was made by defendant as a "wholesaler", "peddler [63] truck sale", "independent wholesaler", "hotel supply house", "slaughterer", "packer" or otherwise.

Said motion will be made upon the ground that such facts and information do not appear from and are not alleged in the amended information filed herein or any of the counts thereof and that such facts and information are necessary to enable defendant to prepare for the trial of the above entitled action.

Said motion will be based upon this notice of motion, the amended information filed herein and the law governing.

Dated this 22 day of October, 1943.

WILLIAM KATZ

Attorney for Defendant

POINTS AND AUTHORITIES

I.

Defendant incorporates by reference the points and authorities heretofore served and filed herein in support of his "Demurrer to the Amended Information" and "Notice of Motion to Quash and Set Aside Amended Information".

II.

A demand for a bill of particulars is the proper remedy to obtain necessary information to enable the defendant to prepare his defense and avoid surprise and substantial prejudice at trial.

Singer v. U. S., 48 Fed. (2) 74, 76;

Collins v. U. S., 253 Fed. 609, 610;

U. S. v. Rentelen, 233 Fed. 793, 799;

U. S. v. Greve, 12 Fed. Supp. 372, 377.

III.

Defendant is entitled to a bill of particulars to secure the information sought by him and enunciated in his motion therefor. [64]

Martin v. U. S., 20 Fed. (2) 785, 786;

Karger v. U. S., 46 Fed. (2) 302, 303;

Baker v. U. S., 115 Fed. (2) 533, 538;

U. S. v. Food and Grocery Bureau, 41 Fed.
Supp. 884, 886;

U. S. v. Allied Chemical & Dye Co., 42 Fed.
Supp. 425, 428, 9;

U. S. v. Empire State Paper Co., 8 Fed.
Supp. 220, 221.

Respectfully submitted,

WILLIAM KATZ

Attorney for Defendant. [65]

Received copy of the within this 22nd day of
October 1943.

CHARES H. CARR

U. S. Attorney

Attorney for Plaintiff

[Endorsed]: Filed Oct. 23, 1943. [66]

At a stated term, to-wit: The September Term,
A. D. 1943, of the District Court of the United
States of America, within and for the Central Di-
vision of the Southern District of California, held
at the Court Room thereof, in the City of Los An-
geles on Monday the 1st day of November in the
year of our Lord one thousand nine hundred and
forty-three.

Present: The Honorable Ben Harrison, District
Judge.

[Title of Cause.]

No. 16-107-Crim.

This cause coming on for hearing on motion of
defendant for a Bill of Particulars; Ernest A.

Tolin, Esq., Special Attorney, Department of Justice, appearing for the Government; William Katz, Esq., appearing as counsel for the defendant; James Marquardt, Court Reporter, being present and reporting the proceedings; the defendant being absent.

Attorney Katz argues in support of defendant's motion; the Court makes a statement and orders said motion denied and exception noted for the defendant. [67]

At a stated term, to-wit: The September Term, A. D. 1943, of the District Court of the United States of America, within and for the Central Division of the Southern District of California, held at the Court Room thereof, in the City of Los Angeles on Tuesday the 9th day of November in the year of our Lord one thousand nine hundred and forty-three.

Present: The Honorable Ben Harrison, District Judge.

[Title of Cause.]

No. 16-107-Crim.

This cause coming on for trial on Amended Information; E. A. Tolin, Esq., Assistant U. S. Attorney, appearing as counsel for the Government; William Katz, Esq., appearing as counsel for the defendant, Clarence O. Flannagan, who is present on bond; and James Marquardt, Court Reporter, being present and reporting the proceedings:

Attorney Tolin states he is ready on counts 8, 10, 11, and 12 for trial and moves for dismissal of the other counts, and it is so ordered by the Court. It is further ordered that the cause be, and it hereby is, transferred to the calendar of Judge McCormick at 10 A. M. today for trial and witnesses are admonished. [68]

At a stated term, to-wit: The September Term, A. D. 1943, of the District Court of the United States of America, within and for the Central Division of the Southern District of California, held at the Court Room thereof, in the City of Los Angeles on Wednesday the 10th day of November in the year of our Lord one thousand nine hundred and forty-three.

Present: The Honorable Paul J. McCormick, District Judge.

[Title of Cause.]

No. 16,107-Crim.

This cause coming on for further jury trial; Ernest A. Tolin, Esq., Assistant U. S. Attorney, and Stanley Jewell, Esq., Attorney, O.P.A., appearing for the Government; William Katz, Esq., appearing as counsel for the defendant; Samuel Goldstein, Court Reporter, being present and reporting the proceedings; the defendant being present; the jury is present; it is ordered that trial proceed.

Attorney Katz renews motion to strike from the record Government's Exhibit No. 1. The motion is denied.

Dr. D. R. Hoffman is called, sworn, and testifies for the defendant.

Counsel approach the Bench at the request of the Court.

Witness Hoffman testifies further.

Earl E. Coward and Clinton Ben Hawkins are called, sworn, and testify for the defendant.

Clarence Flannagan, defendant, is sworn, and testifies in his own behalf.

At 11:32 A.M. the Court reminds the jury of the admonition heretofore given, and declares a recess.

Court reconvenes at 11:42 A. M.; all present as before; the defendant and jury are present; it is ordered that trial proceed.

Witness Flannagan resumes the stand and testifies further.

At 12:10 P.M. the jury is reminded of the admonition heretofore given, and Court recesses to 2 P.M.

Court reconvenes herein at 2:04 P. M.; all present as before; the defendant and jury are present; it is ordered that trial proceed.

Defendant's Exhibit A is offered and admitted into evidence.

Fred French and Graham H. Albright are called, sworn, and testify for the defendant. [79]

At 2:10 P. M. the defendant rests.

Pencil portion of Government's Exhibit No. 8 is

cut out and said portion admitted as Government's Exhibit No. 8.

At 2:15 P. M. the Government rests.

Counsel approach the Bench.

At 2:20 P.M. Attorney Tolin argues to the jury for the Government.

At 2:40 P. M. Attorney Katz argues to the jury for the defendant.

At 3:18 P.M. Attorney Tolin argues to the jury in closing for the Government.

At 3:28 P.M. the Court instructs the jury on the law of this case, and at 4 P.M. L. C. Ramsaur is sworn in as the officer to care for the jury and the jury retires to the jury room to deliberate upon its verdict.

It is ordered that requested instructions given and not given be filed herein.

At 4:07 P. M. O. S. Bulkley is sworn as an additional officer to care for the jury.

The Court orders the defendant to remain in custody until verdict of the jury.

At 4:15 P.M. Court reconvenes herein in the absence of the jury, for the purpose of marking for identification Government's Exhibits Nos. 12, 13, 14, 15 and 16; Government counsel, defendant and his counsel being present, and Court Reporter, after which Court recesses until the return of the jury.

At 5:45 P. M. Court reconvenes; all present as before, except the jury.

Pursuant to stipulation of counsel, it is ordered that a verdict may be received in the absence of

the trial judge, if rendered before 10:30 or 11 o'clock P.M., and if the jury desires to remain in deliberation after that time, they be furnished with suitable accommodations for the night by the U. S. Marshal, and that if a verdict is arrived at prior thereto, same shall be sealed and delivered to the bailiff, who shall turn it over to the Clerk, who shall keep same in his personal custody until the morning, and that the jury shall return into Court at ten o'clock A. M. November 11, 1943, at which time the Court will convene and the sealed verdict shall then be opened in the presence of the jury. It is further ordered that the defendant may remain on his present bond and that he remain in attendance until a verdict is reached or until the further order of the Court. [80]

At the hour of 6:15 P.M. the jury is ordered taken to supper in custody of the two bailiffs previously sworn, at the expense of the Government, and a recess is declared in the case pending agreement upon a verdict.

The jury returns at 8:35 P. M. and resumes deliberations.

Court reconvenes herein at 10:40 P. M.; all present as before.

The jury returns into Court, and the foreman requests that certain evidence given by certain witnesses be read by the reporter, and the reporter now reads certain testimony as requested. The reading is concluded at 11:30 P. M. and the jury again now retires, and a recess is declared until the return of the jury.

Court reconvenes herein at 12:30 A. M., November 11, 1943; all present as before; the defendant and jury are present, and in response to the Court's inquiry the foreman states that the jury has agreed upon verdict; whereupon, pursuant to the Court's order, the verdict is presented and read by the Clerk, and ordered filed and entered herein, being as follows, to wit:

* * * * *

The jury is discharged from the case and excused until notified.

It is ordered that the defendant may remain on present bond and this cause is referred to the Probation Officer for investigation and report and that hearing on said report and sentence be, and it hereby is, continued to November 23, 1943, at 10 A.M. [81]

[Title of District Court and Cause.]

VERDICT

We, the Jury in the above-entitled cause, find the defendant, Clarence O. Flannagan not guilty as charged in the 8th count of the Information, and guilty as charged in the 10th count of the Information, and not guilty as charged in the 11th count of the Information, and not guilty as charged in the 12th count of the Information.

Dated, Los Angeles, Calif., November 11, 1943.

GARDNER HUNTING

Foreman of the Jury.

[Endorsed]: Filed Nov. 11, 1943. [82]

At a stated term, to-wit: The September Term, A. D. 1943, of the District Court of the United States of America, within and for the Central Division of the Southern District of California, held at the Court Room thereof, in the City of Los Angeles on Tuesday the 30th day of November in the year of our Lord one thousand nine hundred and forty-three.

Present: The Honorable: Paul J. McCormick, District Judge.

[Title of Cause.]

No. 16,107—Crim.

This cause coming on for hearing on report of the Probation Officer and sentence of the defendant Clarence O. Flannagan; Ray H. Kinnison, Esq., Assistant U. S. Attorney, appearing for the Government; Wm. Ktz, Esq., appearing as counsel for the defendant; Attorney Kinnison makes a statement; Attorney Katz makes a statement on behalf of the defendant. The Court pronounces judgment against the defendant as follows: [83]

* * * * *

District Court of the United States Southern District of California, Central Division

No. 16107. Criminal Information in 12 counts for violation of U.S.C., Title Emergency Price Control Act of 1942. Secs.

UNITED STATES

v.

CLARENCE O. FLANNAGAN

JUDGMENT AND COMMITMENT

On this 30th day of November, 1943, came the United States Attorney, and the defendant Clarence O. Flannagan appearing in proper person, and by counsel, William Katz, Esq., and,

The defendant having been convicted on verdict of guilty of the offense charged in the Information in the above-entitled cause, to-wit: the 10th count thereof, unlawfully offer for sale and deliver a certain quantity of beef at a price per pound in excess of Revised Maximum Price Regulation No. 169, as amended, as set forth and charged in the 10th count of the Information herein, and the defendant having been now asked whether he has anything to say why judgment should not be pronounced against him, and no sufficient cause to the contrary being shown or appearing to the Court, It Is by the Court

Ordered and Adjudged that the defendant, having been found guilty of said offense, is hereby committed to the custody of the Attorney General

or his authorized representative for imprisonment for the period of Six (6) months in a Federal Jail, and pay unto the United States of America a fine in the sum of One Thousand (\$1000.) Dollars, and that said defendant be further imprisoned until payment of said fine, or until said defendant is otherwise discharged as provided by law.

It is further ordered that execution of the term of imprisonment of six months be suspended for a period of one (1) year, and that said defendant be placed on probation for said period of time under the supervision of the Probation Officer of this Court, to whom he shall report this day, and at such further and other times as shall be required. The condition of probation are that said defendant shall refrain from the violation of any laws; that he observe all lawful regulations of governmental authorities, and otherwise, observe such additional lawful rules and regulations that the aforesaid Probation Officer may impose.

It Is Further Ordered that said defendant be granted 3 days stay of execution to pay the fine herein imposed, and that in the event an appeal is taken, that the amount of said fine be deposited in the Registry of the Court.

It Is Further Ordered that the Clerk deliver a certified copy of this judgment and commitment to the United States Marshal or other qualified officer and that the same shall serve as the commitment herein in default of payment of fine.

(Signed) PAUL J. McCORMICK

United States District Judge.

[Endorsed]: Filed Nov. 30, 1943. [84]

[Title of District Court and Cause.]

NOTICE OF APPEAL UNDER RULE III

Name and Address of Appellant: Clarence O. Flannagan, 325 Santa Ana Avenue, Newport Beach, California.

Name and Address of Appellant's Attorney: Cantillon & Glover, Esqs., 832 Petroleum Building, 714 West Olympic Boulevard, Los Angeles, California.

Offense: Count X—Violation of Revised Maximum Price Regulation, No. 169, issued pursuant to the Emergency Price Control Act of 1942.

Date of Judgment: November 30, 1943.

Brief Description of Judgment or Sentence: Defendant was adjudged and sentenced to serve six months in jail and pay a fine of \$1,000.00, and be further imprisoned until payment of said fine, or until otherwise discharged as provided by law. Execution of the term of imprisonment of six months was suspended for one year and Defendant placed on probation for that period of time, [86] and in the event Defendant takes an appeal, the fine to be deposited in the registry.

Name of Prison where now confined if not on Bail: Appellant is now on bail.

I, the above named Appellant, hereby appeal to the United States Circuit Court of Appeal, for the Ninth Circuit, from the judgment above mentioned on the grounds set forth below.

CLARENCE O. FLANNAGAN
Appellant

Dated: At Los Angeles, California, this 4th day of December, 1943.

GROUNDS OF APPEAL

1. The trial court erred in denying Appellant's demurrer to Count X of the Amended Information.

2. The trial court erred in denying Appellant's motion for an order directing the Government to furnish a Bill of Particulars relative to Count X of the Amended Information.

3. The trial court erred in denying Appellant's motion for a directed verdict of not guilty as to Count X of the Amended Information, made at the close of the Government's case.

4. The trial court erred in denying Appellant's motion for a directed verdict of not guilty as to Count X of the Amended Information made after both sides had rested at the close of the case.

5. The trial court erred in admitting evidence over the objection of the Appellant, which rulings were duly excepted to by Appellant. [87]

6. The trial court erred in refusing to admit evidence proffered by Appellant and objected to by the Government, to which ruling Appellant duly excepted.

7. The trial court erred in the giving of various instructions in its formal charge to the jury, which instructions were specifically excepted to by Appellant within the time and in the manner as prescribed by law.

8. The trial court erred in refusing to give various instructions requested by Appellant, which refusal was duly excepted to by Appellant within the time and in the manner as prescribed by law.

9. The evidence is insufficient to sustain the verdict of the jury as to Count X of the Amended Information.

10. The verdict as to Count X of the Amended Information is contrary to law.

11. The verdict as to Count X of the Amended Information is contrary to the evidence.

12. The verdict as to Count X of the Amended Information is contrary to the law and to the evidence.

13. That Regulation No. 169 of the Revised Maximum Price Regulations is repugnant to and in contravention of the Emergency Price Control Act and the Price Stabilization Act, as enacted and enforced.

CANTILLON & GLOVER

By JOHN E. GLOVER,

Attorneys for Appellant,

Clarence O. Flanagan [88]

Received copy of the within Notice of Appeal
this 4th day of December, 1943.

CHARLES H. CARR

U. S. Atty.

Attorney for Plaintiff

MARY WENTWORTH

[Endorsed]: Filed Dec. 4, 1943. [89]

[Title of District Court and Cause.]

ORDER FIXING BAIL AND STAYING
EXECUTION

The above named Defendant having filed his Notice of Appeal to the United States Circuit Court of Appeal, Ninth Circuit, from the judgment and sentence herein rendered on the 30th day of November, 1943, and having deposited in the registry of this court, the sum of \$1,000.00 cash, pursuant to the order of this court, made on said 30th day of November, 1943;

The Court Now, upon application of Defendant Orders that said \$1,000.00 so deposited is in lieu of supersedeas herein, and in the event of an affirmance of the judgment appealed from, or a dismissal of the appeal, said sum of \$1,000.00 so deposited shall be applied in satisfaction of the fine herein assessed.

It Is Further Ordered that execution of the judgment and sentence be stayed pending appeal, except as to the order relating to and fixing the terms of probation granted to the Defendant by order made on the 30th day of November, 1943, none of which provisions or terms are stayed pending said appeal.

[90]

In view of the foregoing, Defendant is released subject to the probationary part of sentence.

Dated: This 11th day of December, 1943.

PAUL J. McCORMICK

Judge of the United States
District Court

[Endorsed]: Filed Dec. 10, 1943. [91]

[Title of District Court and Cause.]

AFFIDAVIT IN SUPPORT OF ORDER EXTENDING TIME WITHIN WHICH TO PREPARE, SETTLE AND FILE BILL OF EXCEPTIONS, ETC.

State of California

County of Los Angeles—ss.

John E. Glover, being first duly sworn, deposes and says:

That your Affiant is one of the members of the law firm of Cantillon & Glover, Esqs., the attorneys for Clarence O. Flanagan, the above named Defendant, said firm having been retained to appeal from the judgment and sentence heretofore pronounced in the above entitled matter; that the members of said firm have been duly admitted to practice in the above entitled court.

That your Affiant has been unable to complete and lodge a proposed Bill of Exceptions and Assignments of Error in connection with the appeal herein taken, and will be unable to do so within the time allowed by law, for the reason that within the last thirty days, Richard H. Cantillon, Esq., of said law firm has been confined [92] to his home at different intervals suffering from influenza and bronchitis, and there being no other attorney in the office of said law firm, your Affiant has been compelled to handle all of the legal matters during the absence of said Richard H. Cantillon; that Affiant verily believes that he will be able to have said proposed Bill of Exceptions and Assignments of

Error prepared for lodging by the 20th day of January, 1944, and respectfully prays that the court make its order extending the time for the serving and lodging of said proposed Bill of Exceptions and Assignments of Error herein up to and including the 20th day of January, 1944; and that the United States of America, Plaintiff herein, may have up to and including the 4th day of February, 1944, within which to serve and lodge any proposed objections, amendments or additions to said proposed Bill of Exceptions and proposed Assignments of Error; and that the Defendant, Clarence O. Flanagan, may have up to and including the 19th day of February, 1944, within which to settle and have filed his Bill of Exceptions and Assignments of Error.

JOHN E. GLOVER

Subscribed and sworn to before me this 29th day of December, 1943.

EDMUND L. SMITH, Clerk,

U. S. District Court, Southern

District of California

By IRWIN HAMES, Deputy

[Endorsed]: Filed Dec. 31, 1943. [93]

[Title of District Court and Cause.]

ORDER EXTENDING TIME WITHIN WHICH
TO PREPARE, SETTLE AND FILE BILL
OF EXCEPTIONS, ETC.

Good cause appearing therefor, and on application of John E. Glover, Esq., one of the attorneys for Defendant and Appellant, Clarence O. Flanagan, and conforming to the requirements of Rule IX of the Supreme Court Rules of Practice and Procedure in Criminal Cases;

It Is Ordered that Defendant and Appellant, Clarence O. Flanagan, may have up to and including the 20th day of January, 1944, within which to prepare, serve and lodge his proposed Bill of Exceptions and Assignments of Error; that the United States of America, Plaintiff herein, may have up to and including the 4th day of February, 1944, within which to prepare, serve and lodge any proposed objections, amendments or additions to the proposed Bill of Exceptions and Assignments of Error; and that Defendant and Appellant, Clarence O. Flanagan, may have up to and including the 19th day of February, 1944, within which to have settled and filed his [94] Bill of Exceptions and Assignments of Error in the above matter.

Dated: This 31st day of December, 1943.

PAUL J. McCORMICK

Judge of the United States
District Court

[Endorsed]: Filed Dec. 31, 1943. [95]

[Title of District Court and Cause.]

PRAECIPE

To the Clerk of the Above Entitled Court:

Sir:

Please prepare a Transcript of the record to the Circuit Court of Appeals in the above entitled cause, and include therein the following papers and orders:

1. Information, filed July 15, 1943
2. Motion to Quash Information, filed July 21, 1943
3. Demurrer to Information, filed July 21, 1943
4. Order Denying Motion to Quash and Set Aside Information, entered September 30, 1943
5. Order Sustaining Demurrer to Information with Leave to Government to Amend, filed September 30, 1943.
6. Amended Information, filed October 11, 1943
7. Motion to Quash Amended Information, filed October 18, 1943 [96]
8. Demurrer to Amended Information, filed October 11, 1943
9. Order Denying Motion to Quash Amended Information, entered October 18, 1943
10. Order Overruling Demurrer to Amended Information, entered October 18, 1943
11. Defendant's Plea of "Not Guilty", entered October 18, 1943
12. Defendant's Demand and Motion for Order Directing Government to Furnish Bill of Particulars, filed October 23, 1943

13. Order Overruling Defendant's Motion for Bill of Particulars, entered November 1, 1943

14. Government's Exhibits Nos. 1, 2, 3, 4, 5, 6, 7, 9, 10 and 11, filed November 9, 1943

15. Order Dismissing Counts I, II, III, IV, V, VI, VII and IX, as set forth in Amended Information, entered October 9, 1943

16. "Not Guilty" verdicts on Counts VIII, XI and XII of Amended Information, Returned November 10, 1943

17. "Guilty" Verdict as to Count X of Amended Information, Returned November 10, 1943

18. Order Entered November 23, 1943, Referring Case to Probation Officer

19. Judgment and Sentence of the Court, Made and Entered November 30, 1943

20. Notice of Appeal, filed December 4, 1943

21. Order Fixing Bail and Staying Execution Pending Appeal, Entered December 1, 1943

22. Order Extending Time to File Bill of Exceptions, Entered December 31 1943

23. Minute Entry Showing Lodging of Proposed Bill of Exceptions and Filing of Assignments of Error January 20, 1944

24. Order Enlarging Time to Government to Lodge Proposed [97] Amendments to Proposed Bill of Exceptions, Entered February 7, 1944

25. Assignments of Error on Appeal, filed January 20, 1944

26. Praecipe of the Record on Appeal, filed April 1, 1944

Dated: This 1st day of April, 1944

CANTILLON & GLOVER

By RICHARD H. CANTILLON

Attorneys for Defendant

Received copy of the within Praeceptum this 1st day of April, 1944.

CHARLES H. CARR

U. S. Atty.

By R. MACKAY

Attorney for United States.

[Endorsed]: Filed April 1, 1944. [98]

[Title of District Court and Cause.]

CERTIFICATE OF CLERK

I, Edmund L. Smith, Clerk of the District Court of the United States for the Southern District of California, do hereby certify that the foregoing pages numbered from 1 to 98 inclusive contain full, true and correct copies of: Minute Order Entered July 15, 1943; Information; Motion to Quash and Set Aside Information; Demurrer to Information; Minute Orders Entered September 30, 1943 and October 11, 1943 respectively; Amended Information; Motion to Quash and Set Aside Amended Information; Demurrer to Amended Information; Minute Order Entered October 18, 1943; Motion for Bill of Particulars; Minute Order Entered November 1, 1943; Minute Order Entered November 9, 1943; Government's Exhibits Nos. 1, 2, 3, 4, 5, 7, 9,

10, and 11; Minute Order Entered November 10, 1943; Verdict; Minute Order Entered November 30, 1943; Judgment and Commitment; Notice of Appeal; Order Fixing Bail and Staying Execution; Affidavit in Support of Order Extending Time Within Which to Prepare, Settle and File Bill of Exceptions, etc.; Order Extending Time Within Which to Prepare, Settle and File Bill of Exceptions etc.; and Praecipe which, together with the Original Assignment of Errors and Bill of Exceptions, transmitted herewith, constitute the record on appeal to the Circuit Court of Appeals for the Ninth Circuit.

I further certify that my fees for preparing, comparing, correcting and certifying the foregoing record amount to \$34.55 which sum has been paid to me by appellant.

Witness my hand and the seal of said District Court this 13 day of April, 1944.

[Seal]

EDMUND L. SMITH, Clerk

By THEODORE HOCKE,

Deputy Clerk

In the United States Circuit Court of Appeals
for the Ninth Circuit

No. 16107

CLARENCE O. FLANNAGAN,

Appellant,

v.

UNITED STATES OF AMERICA,

Appellee.

ORDER ENLARGING TIME

Upon reading affidavit of Ernest A. Tolin,

It Is Ordered That the time within which the appellee may lodge its proposed amendments, include amplifications, reductions, and corrections to the proposed Bill of Exceptions lodged by appellant be enlarged to February 29, 1944, and that the Court have to March 15, 1944, within which to settle the same.

Dated: February 4th, 1944.

CURTIS D. WILBUR

FRANCIS A. GARRECHT

WILLIAM HEALY

Judges of the Circuit Court

A true copy.

Attest: Feb. 4, 1944.

PAUL P. O'BRIEN

Clerk.

[Endorsed]: Filed Feb 4, 1944. Paul P. O'Brien,
Clerk.

[Title of Circuit Court of Appeals and Cause.]

AFFIDAVIT FOR ENLARGEMENT
OF TIME

State of California

County of Los Angeles—ss.

Ernest A. Tolin, being first duly sworn, deposes and says:

That he is the Assistant United States Attorney who has been assigned to represent the appellee in the above entitled matter:

That in order to properly prepare the Government's proposed amendments to the Bill of Exceptions lodged by appellant it has become necessary for affiant to order further portions of the transcript of the trial of the case than has heretofore been prepared by the reporter, that said additional portion of the transcript was not delivered by the reporter until February 1, 1944, that there does not remain sufficient time with which to properly prepare the Government's proposed amendments to the Bill of Exceptions within the time at present fixed, that affiant is engaged in the preparations of proposed amendments to Bill of Exceptions in three other matters and is engaged in matters pending before the United States District Court and set for trial during the current week.

Wherefore, affiant prays that this Honorable Court extend the time within which appellee may lodge its proposed amendments, including amplifications, reductions, and corrections to the Bill of

Exceptions lodged by appellant to the 29th day of February, 1944.

ERNEST A. TOLIN

Subscribed and sworn to before me this 2 day of February, 1944.

[Seal] MARY M. DONETTI

Notary Public in and for said County and State.

My Commission Expires Feb. 26, 1947.

[Endorsed]: Filed Feb. 7, 1944. Edmund L. Smith, Clerk, by Irwin Hames, Deputy Clerk.

In the United States District Court, Southern
District of California, Central Division

No. 16107

UNITED STATES OF AMERICA,

Plaintiff,

vs.

CLARENCE O. FLANNAGAN,

Defendant.

DEFENDANT'S ASSIGNMENTS
OF ERROR

Comes now the Defendant and Appellant in the above entitled and numbered cause, and files the following Assignments of Error upon which he will rely in the prosecution this, his appeal, herewith petitioned for in said cause, from the judgment and sentence of this court, entered on the 30th day of November, 1943:

ASSIGNMENT OF ERROR No. 1

That the Court erred in denying the Motion to Quash and Set Aside the Amended Information, made by this Defendant on the 18th day of October, 1943, as to Count X of said Amended Information, which Motion was based upon the following grounds:

That said Count X fails to state facts sufficient to constitute a criminal offense and that the laws, rules and regulations upon which said Information purports to be based are arbitrary, discriminatory, unreasonable, invalid, unconstitutional and void.

That Defendant duly excepted to said ruling of the trial court.

ASSIGNMENT OF ERROR No. 2

That the Court erred in overruling the Demurrer of the Defendant to Count X of the Amended Information, which Demurrer was based upon the following grounds; and to which ruling the Defendant duly excepted:

(a) That Count X of said Amended Information fails to state facts sufficient to constitute a criminal offense;

(b) That Count X of said Amended Information is uncertain in that it cannot be determined therefrom:

1. What crime, if any, Defendant is alleged to have committed:

2. Whether the sale of the beef alleged to have been sold by Defendant was made by Defendant as

a “wholesaler”, “peddler truck sale”, “independent wholesaler”, “hotel supply house”, “slaughterer”, “packer”, or otherwise.

3. Whether the sale alleged to have been made by Defendant was made to a wholesaler, retailer, purveyor of meals or otherwise.

4. In what respects, if any, the purported crime attempted to be alleged in said Count X differs from the purported crimes attempted to be alleged in Counts I, II, III, IV, V, VI, VII, IX and XII of said Amended Information.

(c) That Count X of said Amended Information is indefinite in each and all of the respects in which it is heretofore set forth to be uncertain.

(d) That Count X of said Amended Information is ambiguous in each and all of the respects in which it is heretofore set forth to be uncertain and indefinite.

ASSIGNMENT OF ERROR No. 3

That the Court erred and abused its discretion in denying the Motion and Demand of the Defendant to compel the Government to furnish Defendant a Bill of Particulars as to Count X of the Amended Information, which was as follows:

(a) What grade of beef Defendant is alleged to have sold and whether such beef was a “beef carcass” or a beef cut or beef cuts, and if a beef cut, or beef cuts, the kind and type of cut or cuts;

(b) What the maximum price is, was or is claimed to be, or have been, for the beef alleged to have been sold by Defendant;

(c) Whether the sale of the beef alleged to have been sold by Defendant was made by Defendant as a “wholesaler”, “peddler truck sale”, “independent wholesaler”, “hotel supply house”, “slaughterer”, “packer”, or otherwise.

The Defendant duly excepted to the ruling thereon.

ASSIGNMENT OF ERROR No. 4

That the Court erred in allowing into evidence on direct examination the testimony of the Government’s Witness Kilduff, relating to a conversation between the Defendant and the Witness Kilduff tending to establish another transaction not charged in any Count of the Amended Information, and assertedly occurring on June 24, 1943, and involving a sale of meat on that day to the Witness Kilduff purportedly in excess of that then lawful under the provisions of the Revised Maximum Price Regulation 169 as amended. The Witness Kilduff was asked the following question:

Q. Tell us what you said and what he said about it?

The Defendant objected to the question being answered on the following specified grounds: First, that it was incompetent; second, that it was irrelevant; third, that it had no bearing on the issues of the case; fourth, that a corpus delicti had not been established. That the trial court overruled the objections and each of them of the Defendant, and the Defendant took his exception to said ruling.

The substance of the conversation admitted over objection was:

Q. Tell us what was said about it, if you recall?

Objection was made to the conversation on the grounds that it was incompetent, irrelevant, and had no bearing on the issues; no foundation; and no corpus delicti had been established, which objection was overruled and exception taken.

The substance of the conversation was that Flannagan stated to the Witness that he had heard the Witness wanted some meat; that he could supply him with a little, but probably not all he needed; and that there was an overage on it; that at that time no one other than Flannagan was present; that the Witness saw the truck containing meat; that he purchased meat and Flannagan carried it into the Witness' ice box; that at the said time, the Defendant delivered to the Witness Government's Exhibit No. 1, and that he received from Flannagan the meat that is listed on the invoice.

In response to a question as to whether anything was said by Flannagan or by the Witness with regard to any other moneys or payments, the Witness stated there was not much of any thing said, only he told me how much other cash I owed; that was for him; that the Witness did not recall the amount in money.

ASSIGNMENT OF ERROR No. 5

That the Court erred in allowing into evidence Government's Exhibit No. 1, a document purporting to be a written invoice assertedly handed by the Defendant to the Witness Kilduff on January 24, 1943, and relating to a sale of meat made by the Defendant to said Witness on that said day, which said transaction was not made the basis of any Count contained in the Amended Information; that the Defendant objected to the introduction of said Exhibit No. 1 on the following grounds: (1st) that it is incompetent; (2d) that it is irrelevant; (3rd) that it is immaterial; and (4th) that it had no bearing on the issues of the case.

The objections, and each of them, were overruled and the Defendant duly excepted.

ASSIGNMENT OF ERROR No. 6

That the Court erred in allowing the Government's Witness Kilduff, while on direct examination, to refer to and inspect the writing, Government's Exhibit No. 6 for identification, over the objections of the Defendant that the said writing was: (1st) incompetent; (2d) irrelevant; (3rd) immaterial; (4th) hearsay; and (5th) that it was matter having no bearing on the case, to all of which the Defendant duly excepted.

ASSIGNMENT OF ERROR No. 7

That the Court erred in permitting the Government to establish through the testimony of the Witness Kilduff, on direct examination, the occurrence

of an asserted transaction had as between the Witness Kilduff on the 25th day of June, 1943, and the Defendant, relating to the sale of meat by the Defendant to the Witness Kilduff at a price in excess of that lawful under the provisions of Revised Maximum Price Regulation 169, the Defendant having objected to the introduction of such evidence on the ground that the same was: (1st) incompetent; (2d) irrelevant; (3rd) immaterial; and (4th) that it had no bearing on the issues in the instant case. The Defendant duly excepted to the Court's ruling on said objections.

ASSIGNMENT OF ERROR No. 8

That the Court erred in overruling the objection of the Defendant made after the Witness Kilduff had read and inspected the writing, Government's Exhibit No. 6, for identification, to the question, and in allowing the answer relative to an asserted overage paid for meat on June 25, 1943:

Q. By Mr. Tolin: Is your memory now refreshed, Mr. Kilduff, as to the amount that you paid to Mr. Flannagan in addition to the check that you gave him on the 25th day of June of 1943?

Q. Well, just what it says there.

A. Tell us.

Mr. Katz: Just a moment, if the Court please. I will object to what it says on the paper.

The Court: Yes, that will go out, gentlemen. You disregard it.

Q. By Mr. Tolin: Tell us how much you paid him over and above the amount of the check that you gave him on the 25th day of June.

Mr. Katz: Objected to, if the Court please; incompetent, irrelevant and immaterial. It has already been asked and answered.

The Court: Overruled.

Mr. Katz: Exception noted.

The Witness: \$39.48

to which ruling the Defendant duly excepted.

ASSIGNMENT OF ERROR No. 9

That the Court erred in overruling the objection of the Defendant made after the Witness had read and inspected the writing, Government's Exhibit No. 6, for identification, to the question and in allowing the answer of said Witness relative to asserted overage paid by the Witness to the Defendant for meat on the 28th day of June, 1943:

Q. By Mr. Tolin: Is your memory now refreshed, Mr. Kilduff, as to the amount you paid him on the 28th day of June, 1943, over and above the amount of the check?

A. It is on there. \$29.75.

Mr. Katz: Just a minute, if the Court please. I will move to strike for the purpose of the objection.

The Court: That may go out. Disregard it, gentlemen.

Q. By Mr. Tolin: Mr. Kilduff, is your memory now refreshed as to the amount that you paid over and above the amount of the check on the 28th of June, 1943? Please tell us yes or no.

A. Yes.

Q. What amount did you pay over and above the amount of the check on that date; that is to say, on the 28th day of June of 1943?

A. \$29.75.

Q. What is this that I have shown you here, Exhibit 6, for identification?

A. The statement that I gave on that day.

Q. To whom?

Mr. Katz: Objected to, if the Court please; incompetent, irrelevant and immaterial. The statement is hearsay.

The Court: Sustained.

Q. By Mr. Tolin: What was the date on which you gave this statement?

A. 28th of June.

to which ruling the Defendant duly excepted.

ASSIGNMENT OF ERROR No. 10

That the Court erred in denying the Defendant's motion for a directed verdict, made at the conclusion of the Government's case, based on the grounds: (1st) that the allegations contained in Count X did not set forth the commission of an offense against the Government; and (2d) that the evidence adduced by the Government was insufficient to establish the commission of the offense

alleged in Count X. The Defendant duly excepted to the ruling on the motion.

ASSIGNMENT OF ERROR No. 11

That the Court erred in denying the motion of the Defendant for a directed verdict made after both the Government and the Defendant had rested their respective cases, based on the grounds: (1st) that the allegations contained in Count X did not set forth the commission of an offense against the Government; and (2d) that the evidence adduced by the Government was insufficient to establish the commission of the offense alleged in Count X. The Defendant duly excepted to the ruling on the motion.

ASSIGNMENT OF ERROR No. 12

The Court erred in giving to the jury the following instruction offered by the government and that this portion of the court's charge was duly excepted to by the defendant in the manner and within *the prescribed* by law.

PLAINTIFF'S INSTRUCTION No. 1

I am *about instruct* you as to what the highest legal prices that could be charged retail meat dealers for beef were on the dates pertinent to the several counts of the Information in this case.

Before giving you such maximum prices, I instruct you that the prices I will read to you are deemed to include the highest legal price for the

meat and service charge. On the dates with which you are concerned, it was not lawful for a seller of meat to a retail meat dealer, to add any charge or bonus, or side money in any amount whatsoever, to the prices I am about to quote to you.

Emergency Price Control Act of 1942.

Revised Maximum Price Regulations 169, as amended by Amendment 6, (dated April 12, 1943, effective April 14, 1943).

The prices as to Counts 10, 11, and 12, are taken from R.M.P.R. 169, as amended by Amendment 15, dated June 7, 1943, effective June 19, 1943).

Instruction No. 1

Given as Requested: ✓

Given as Modified:

Refused:

.....

United States District Judge.

ASSIGNMENT OF ERROR No. 13

The court erred in giving to the jury the following instruction offered by the government and that this portion of the court's charge was duly excepted to by the defendant in the manner and within the time prescribed by law.

PLAINTIFF'S INSTRUCTION No. 5

On the third of June, 1943, the highest price at which it was lawful to offer for sale or to sell and deliver a U. S. Grade A beef carcass to a retail dealer was twenty-four and one quarter cents per pound.

Revised Maximum Price Regulation 169, as amended by Amendment 6, dated April 12, 1943, effective April 14, 1943.

To the price set forth in the Table (1364.452 of Reg. 169 as amended by amendment 6) is added the allowance for differential due vendors in Zone I, which includes all of California. (136.452 of R.M.P.A. 169, sub 2.)

There is also added the addition allowed for Peddler-Truck selling. (Section 1364.454 of R.M.P.R. 169 as amended, sub. G.)

Instruction No. 3.

Given as Requested: ✓

Given as Modified: _____

Refused: _____

United States District Judge.

ASSIGNMENT OF ERROR No. 14

The court erred in giving to the jury the following instruction offered by the government and that this portion of the court's charge was duly excepted to by the defendant in the manner within the time prescribed by law.

PLAINTIFF'S INSTRUCTION No. 5

On the 25th day of June, 1943, the highest price at which it was lawful to offer for sale or to sell and deliver U. S. Grade A beef to a retail dealer was twenty-two and one quarter cents per pound.

Emergency Price Control Act of 1942.

R.M.P.R. 169 as amended by Amendment 15,

dated June 7, 1943, effective June 19, 1943. (Table in 1364.452 of the Regulation as amended.)

To the prices set forth in the Table, is added the allowance for differential due vendors in Zone I; which includes all of California. (Section 1364.452 of R.M.P.R. 169 as amended, Sub. 2.)

There is also added the addition allowed for Peddler-Truck selling. (Section 1364.454 of R.M.P.R. 169 as amended, Sub. G.)

Instruction No. 5.

Given as Requested: ✓

Given as Modified:

Refused:

United States District Judge.

ASSIGNMENT OF ERROR No. 15

The court erred in giving to the jury the following instruction offered by the government and that this portion of the court's charge was duly excepted to by the defendant in the manner and within the time prescribed by law.

PLAINTIFF'S INSTRUCTION No. 6

I have quoted you a price of twenty-four and one quarter cents a pound as the legal maximum price for a U. S. Grade A beef carcass on June 3, 1943; and a legal maximum price for the same quality beef on June 25, 1943, as twenty-two and one quarter cents per pound.

In order that you will not be confused by the fact that these prices vary, I explain to you that one set

of prices was lawful between April 14, 1943 and June 19, 1943. On this latter date, a new price list went into effect. The date alleged with respect to Count VIII is within the period of time covered by one maximum price.

All other counts of the Information allege dates within the time period covered by the superseding price list.

Instruction No. 6

Given as Requested:

Given as Modified ✓

Refused:

.....

United States District Judge.

ASSIGNMENT OF ERROR No. 16

The court erred in giving to the jury the following instruction offered by the government and that this portion of the court's charge was duly excepted by the defendant in the manner and within the time prescribed by law.

PLAINTIFF'S INSTRUCTION No. 8

On the 28th day of June, 1943, the highest price at which it was lawful to offer for sale or to sell and deliver a U. S. Grade B beef carcass to a retail dealer was twenty and one quarter cents per pound.

Instruction No. 8

Given as Requested: ✓

Given as Modified:

Refused:

.....

United States District Judge.

ASSIGNMENT OF ERROR No. 17

The court erred in giving to the jury the following instruction offered by the government and that this portion of the court's charge was duly excepted to by the defendant in the manner and within the time prescribed by law.

PLAINTIFF'S INSTRUCTION No. 11

On the 25th day of June, 1943, the highest price at which it was lawful to offer for sale or to sell and deliver the following mentioned varieties of meat to a retail dealer were as follows: Oxtail, fourteen and three quarter cents per pound; Brain, ten and three quarter cents per pound; Heart, eighteen and three quarter cents per pound; Liver, twenty-six and three quarter cents per pound; Tongue, twenty-five and three quarter cents per pound.

Instruction No. 11

Given as Requested: ✓

Given as Modified:

Refused:

.....

United States District Judge.

ASSIGNMENT OF ERROR No. 18

The court erred in giving to the jury the following instruction offered by the government and that this portion of the court's charge was duly excepted to by the defendant in the manner and within the time prescribed by law

PLAINTIFF'S INSTRUCTION No. 12

The defendant is here prosecuted for alleged violations of the Emergency Price Control Act of 1942. This law was adopted by the Congress of the United States pursuant to authority given to the Congress of the United States by the Constitution. You are not concerned with its wisdom or unwisdom. It is the law of the land and you must be governed by it in the determination of this case. This law the Congress had the right to pass and it does not violate any of the constitutional rights of any person. The maximum prices at which various meats can be lawfully sold to retail dealers as I shall give them to you have been lawfully fixed under the Emergency Price Control Act of 1942 to which I have just referred and such lawfully fixed maximum prices are binding upon you and must be so considered in your deliberations.

Instruction No. 12

Given as Requested:

Given as Modified: ✓

Refused:

.....

United States District Judge.

ASSIGNMENT OF ERROR No. 19

The court erred in giving to the jury the following instruction offered by the government and that this portion of the court's charge was duly excepted to by the defendant in the manner and within the time prescribed by law.

PLAINTIFF’S INSTRUCTION No. 13

The Emergency Price Control Act of 1942, provides that any person who wilfully violates certain provisions of the Act shall be guilty of an offense.

Among the provisions of the Act to which this provision applies is the following:

“It shall be unlawful, regardless of any contract, agreement, * * * or other obligation heretofore or hereafter entered into, for any person to sell or deliver any commodity, * * * or otherwise do or omit to do any act, in violation of any regulation or order * * * of any price schedule effective in accordance with the provisions of” this Act.

The prices which I shall read to you as the highest lawful prices in effect on certain days for the several meat items to which I shall refer were fixed in accordance with the Emergency Price Control Act of 1942 from which I have just read and those prices, and each and every one of such prices was accordingly fixed by law.

Emergency Price Control Act of 1942, Section 4(a), 205(a).

Instruction No. 13

Given as Requested: ✓

Given as Modified:

Refused:

.....

United States District Judge.

ASSIGNMENT OF ERROR No. 20

The court erred in giving to the jury the following instruction offered by the government and that this portion of the court's charge was duly excepted to by the defendant in the manner and within the time prescribed by law.

PLAINTIFF'S INSTRUCTION No. 14

This is an offense requiring a specific intent, and such intent must be shown to exist beyond a reasonable doubt. The intent on the part of the defendant may be shown by his acts and declarations and by the circumstances surrounding his actions which, when taken together, must prove beyond a reasonable doubt that the defendant had the specific intent to wilfully sell and deliver meat at a price or prices in excess of the lawful price or prices.

If you are convinced beyond a reasonable doubt that the defendant did in fact sell meat to any one, or more of the persons named in the several counts of the Information, and that he did in fact charge a price or prices for such meat in excess of the prices I have read to you, and that he at such time or times intended to so sell such meat at a higher price or prices than permitted by the Maximum Price Regulations promulgated under the Emergency Price

Control Act of 1942, then you will find that he did so with a specific intent.

Instruction No. 14

Given as Requested: ✓

Given as Modified:

Refused:

.....

United States District Judge.

ASSIGNMENT OF ERROR No. 21

The court erred in refusing to give the following defendant's proposed and offered instruction to which refusal the defendant within the time and in the manner prescribed by law duly excepted.

DEFENDANT'S REQUESTED INSTRUCTION No. 2

The mere fact that an information has been filed charging the defendant with a crime does not itself raise any presumption or inference as to the guilt of the defendant. The mere fact that he has been brought into court by the ordinary criminal process and is here on trial, should not be considered by you as any evidence whatsoever of his guilt.

ASSIGNMENT OF ERROR No. 22

The court erred in refusing to give the following defendant's proposed and offered instruction to which refusal the defendant within the time and in the manner prescribed by law duly excepted.

DEFENDANT'S PROPOSED INSTRUCTION
No. 5

You are instructed that the presumption of innocence is not a mere matter of form, to be disregarded by you at your pleasure, but is an essential, substantial part of the law of the land, and binding upon you in this case, and it is your duty to give the defendant the full benefit of this presumption and to acquit him, unless the evidence in the case convinces you beyond all reasonable doubt of the guilt of the defendant.

ASSIGNMENT OF ERROR No. 23

The court erred in refusing to give the following defendant's proposed and offered instruction to which refusal the defendant within the time and in the manner prescribed by law duly excepted.

DEFENDANT'S PROPOSED INSTRUCTION
No. 6

The jury is instructed that each essential independent fact necessary to complete a chain or series of independent facts tending to establish a presumption of guilt, should be established to the same degree of certainty as the main fact which these independent circumstances taken together tend to establish, that is, each essential independent fact in the chain or series of facts relied upon to establish the main fact, must be established to a moral certainty and beyond a reasonable doubt and to the entire satisfaction of the jury. The circumstances

must all concur to show that the defendant committed the crime and must all be inconsistent with any other rational conclusion and must exclude to a moral certainty and to the entire satisfaction of the jury any other hypothesis but the single one of guilt.

ASSIGNMENT OF ERROR No. 24

The court erred in refusing to give the following defendant's proposed and offered instruction to which refusal defendant within the time and in the manner prescribed by law duly excepted.

DEFENDANT'S PROPOSED INSTRUCTION No. 8

It is not your duty to look for some theory upon which to convict the defendant, but, on the contrary, it is your duty and the law requires you to, if you can reasonably do so, reconcile any and all circumstances that have been shown with the innocence of the defendant, and so acquit him.

ASSIGNMENT OF ERROR No. 25

The court erred in refusing to give the following defendant's proposed and offered instruction to which refusal the defendant within the time and in the manner prescribed by law duly excepted.

DEFENDANT'S PROPOSED INSTRUCTION No. 15

If you believe from the evidence in this case that any witness in the case was influenced or induced to

become such a witness and to testify in this case by any hope held out that he would not be prosecuted for any reason for offenses committed, then the jury should take such facts into consideration in determining the weight and credit which should be given to the testimony of a witness thus obtained.

ASSIGNMENT OF ERROR No. 26

The court erred in refusing to give the following defendant's proposed and offered instruction to which refusal the defendant within the time and in the manner prescribed by law duly excepted.

DEFENDANT'S PROPOSED INSTRUCTION No. 16

You cannot base a verdict of guilt upon extra-judicial oral admissions, or statements of a defendant alone, unless there is other evidence independent of such extra-judicial oral admissions or statements which establishes the body of the crime with which defendant is charged, or what is known as the corpus delicti, and if you do not believe after a consideration of all the evidence that the body of the crime or the corpus delicti is established by evidence other than such extra-judicial oral admissions or statements, then and in that event, you cannot consider such extra-judicial admissions or statements for any purpose.

ASSIGNMENT OF ERROR No. 27

The court erred in refusing to give the following defendant's proposed and offered instruction to

which refusal the defendant within the time and in the manner prescribed by law duly excepted.

DEFENDANT'S PROPOSED INSTRUCTION
No. 17

In order to convict the defendant upon the evidence of circumstances, it is necessary not only that all the circumstances concur to show beyond a reasonable doubt that a crime was committed as alleged in the information, but that the defendant was the one who committed such crime and that they are inconsistent with any other rational conclusion. It is not sufficient that the circumstances prove, coincide with, account for, and therefore render probable the theory sought to be established by the prosecution, but they must exclude to a moral certainty every other theory but the single one of guilt, or the jury must find the defendant not guilty.

ASSIGNMENT OF ERROR No. 28

The court erred in refusing to give the following defendant's proposed and offered instruction to which the defendant within the time and in the manner prescribed duly excepted.

DEFENDANT'S REQUESTED INSTRUCTION
No. 22

You are instructed that under and by virtue of Maximum Price Regulations No. 148, 169 and 239, any person who in the course of trade or business buys or receives any carcasses or cuts governed by

such regulation is equally as guilty as the seller in the commission of the crime. If you find that any witness or witnesses bought or received such carcasses or cuts, each such witness was a principal and the testimony of each such witness should be received with caution and viewed with distrust and you should not accept it unless it so far harmonizes with the other testimony in the case as to leave in your mind no reasonable doubt of its truth.

ASSIGNMENT OF ERROR NO. 29

The court erred in refusing to give the following defendant's proposed and offered instruction to which refusal the defendant within the time and in the manner prescribed by law duly excepted.

DEFENDANT'S REQUESTED INSTRUCTION No. 23

You are instructed that Maximum Price Regulation No. 169, issued by the Price Administrator of the office of Price Administration, governs beef and veal carcasses and wholesale cuts and, in so far as is material to this case, provides as follows:

Section 1364.401 (a) Beef Carcasses and Wholesale Cuts.

On and after December 16, 1942, regardless of any contract, agreement or other obligation, no person shall sell or deliver any beef carcass or any wholesale cut, and no person shall buy and receive beef carcasses or wholesale beef cuts at a price higher than the maximum price permitted by Section 1364.451; and no person shall agree, offer, solicit

or attempt to do any of the foregoing. The provisions of this revised maximum price regulation No. 169 shall not be applicable to sales of beef carcasses or beef wholesale cuts to a purchaser, if, prior to December 10, 1942, such beef carcasses or beef wholesale cuts have been received by a carrier other than a carrier owned or controlled by the seller, for shipment to such purchaser. "Person", "Beef carcasses" and "Beef wholesale cut" are defined in Section 1364.55.

Section 1364.402. Exempt sales.

The provisions of this Revised Maximum Price Regulation No. 169 shall not apply

(a) To sales at retail:

(1) As defined in Section 1364.455 with respect to sales of beef; and

(2) As defined in Section 1364.470 with respect to sales of veal; and

(3) As defined in Section 1364.477 with respect to sales of processed products;

(b) To deliveries of beef made to any political subdivision or agency of any state or of the United States under contracts entered into prior to December 10, 1942: provided, that this exemption shall not be construed to permit the upward revision of any prices fixed in such contracts.

Section 1364.406. Evasion.

(a) The price limitation set forth in this revised price regulation shall not be evaded, either by direct or indirect methods, in connection with an offer, solicitation, agreement, sale, delivery, purchase or receipt of, or relating to, beef, veal, or

processed products, separately or in conjunction with any other commodity or services or by way of any commission, service, transportation, wrapping, packaging or other charge, or discount premium or other privilege, or by tying agreement or other trade understanding, or by changing the selection of grading, or the style of dressing, cutting, trimming, cooking or otherwise processing or the canning, wrapping or packaging of beef, veal or processed products, or otherwise: Provided, that the payment by a buyer to a seller for icing services performed by the seller after April 2, 1943, and before delivery of any beef carcass or wholesale cut or veal carcass or wholesale cut to a railroad whose charges are paid directly to such railroad by the buyer shall not be construed as an evasion of such price limitations, if the charge for such icing services is no higher than the cost actually incurred by the seller in performing such service and in no event, higher than the charge which could lawfully have been made by the railroad if such service had been performed by the railroad.

(b) Specifically, but not exclusively, the following practices are prohibited:

(1) Unnecessarily routing beef or veal through any distribution point in order to obtain a higher zone price or for the purpose of making a higher transportation or local delivery charge.

(2) Falsely or incorrectly grading or invoicing beef, veal, or processed products.

(3) Selling or invoicing kosher beef, kosher veal, or kosher processed products to purchasers who are not bona fide buyers of kosher meat.

(4) Selling or invoicing beef or veal at the prices established for sales by hotel supply houses to buyers other than bona fide purveyors of meals, war procurement agencies, or other government agencies.

(5) Offering, selling or delivering beef, veal or any processed products on condition that the purchaser is required to purchase some other commodity.

(6) Making or receiving a charge for delivery on the basis of a route different from that actually followed and in excess of that permitted for the route by which beef or veal was actually delivered.

(7) Selling or transferring title to cattle or calves by a purchaser thereof at a lower price than was paid for such cattle or calves and/or repurchasing purchasing, or receiving title to dressed carcasses or wholesale cuts derived from such cattle or calves after the cattle or calves have been slaughtered by a custom slaughterer.

(8) Charging, paying, billing, or receiving any consideration for or in connection with any service for which a specific allowance has not been provided in this Revised Maximum Price Regulation No. 169.

Section 1364.411. Duty to Maintain Grades.

No person shall sell, offer to sell, deliver or break any beef carcass or veal carcass, unless each such carcass has been graded in accordance with the provisions of this section. No custom slaughterer shall ship or deliver any beef carcass or wholesale cut, or veal carcass or wholesale cut unless each such carcass or wholesale cut has been graded in accord-

ance with the provisions of this section. Each person shall maintain uniform grades, as specified in paragraph (a) of this section; and shall determine his maximum prices upon the basis of such uniform grades, as provided in paragraph (b) of this section.

(a) Uniform grades.

(1) Beef carcasses and wholesale cuts derived from steers, heifers and cows shall be graded into the following uniform grades: choice, good, commercial, utility, and cutter and canner; except that no cow carcass or wholesale shall be graded choice. Beef carcasses and wholesale cuts derived from bulls and stags shall be graded in the same manner, except that no bull carcass or wholesale cut shall be graded choice or good, and no stag carcass or wholesale cut shall be graded choice. In determining the grade of each beef carcass or beef wholesale cut, the "Specifications for Official United States Standards for Grades of Carcass Beef" shall be used, except that the specifications therein for the two grades, prime and choice, shall be combined and treated as a single grade choice, and the specifications therein for the two grades, cutter and canner, shall be combined and treated as a single grade.

(b) Duty to determine maximum prices on the basis of uniform grades.

The word "grade" as used in Sections 1364.451, 1364.452, 1364.466 and 1364.467 and in paragraph (c) of this section, means any uniform grade referred to in paragraph (a) of this section and shall not be construed to mean the private grade of an individual seller.

Irrespective of the price grading system heretofore used by the seller, it shall be the duty of the seller, except as provided in paragraph (c) (3), to have classified into the uniform grades provided for in paragraph (a) of this section, by an official grader of the United States Department of Agriculture, the beef carcasses and beef wholesale cuts of cattle slaughtered by the seller or sold by the seller, and then to determine the maximum price for each grade of beef carcass and beef wholesale cut by reference to Sections 1364.451 and 1364.452.

(c) Duty to identify products by sex marks.

The sex identification shall be stamped on all bull and stag carcasses and wholesale cuts. The grade and prescribed sex identification of each beef carcass and wholesale cut, and veal carcass and wholesale cut must appear on the seller's invoice.

(1) The appropriate grade for each uniform grade shall be as follows:

Beef Grade

Choice or AA

Good or A

Commercial or B

Utility or C

Cutter)

Canner) or D

Section 1364.451. Maximum Prices for Beef carcasses and wholesale cuts.

Subject to the pricing instructions contained in paragraph (a), the maximum price of each grade of each beef carcass or wholesale cut shall be the

maximum price determined as provided in paragraph (b).

(a) Pricing instructions.

(1) Whenever used in this Revised Maximum Price Regulation No. 169, the term "lower price zone" means a price zone having a lower zone price, and the term "higher price zone" means a price zone having a higher zone price; the words "lower" and "higher" used in the respective terms shall not be construed to refer to the numerical designation of any zone.

(2) Except for the additions permitted in Schedule III hereof, incorporated herein as Section 1364.454, the zone price shall be the delivered price anywhere within the zone to which such price applies. Schedule I (paragraph (a) to (j) inclusive) hereof, incorporated herein as Section 1364.452 contains a statement describing the geographical limits of each price zone and the zone prices established therefor.

(3) The applicable zone price shall be the price specified in Schedule I (Section 1364.452) for the zone in which is located the seller's distribution point:

(i) At which the buyer takes actual physical possession of the meat; or

(ii) From which local delivery to the buyer's place of business begins; or

(iii) From which the meat, consigned to the buyer, (a) is delivered to a common carrier, other than a railroad, for shipment to the buyer, who pays the shipping charges directly to the carrier, or (b) is delivered to a railroad for shipment at the car-

load rate to the buyer who pays the shipping charges directly to the carrier.

(iv) In the case of a less than carload rail shipment, other than an express shipment to a purveyor of meals, the applicable zone price shall be the price for the zone in which is located the rail unloading station nearest to the buyer's place of business.

(v) On sales to purveyors of meals the distribution point may be, in addition to those listed, the point at which meat consigned to the buyer is delivered to a railway express company for shipment by express to the buyer who pays the shipping charges directly to the carrier.

(4) Except as permitted in paragraph (l), (m), (n), (o), or (p) of Schedule I (Section 1364.452), regardless of any contract, agreement or other obligation, no person shall sell or deliver any beef or any part or portion of any beef carcass and no person in the course of trade or business shall buy or receive any beef or any part or portion of any beef carcass or a beef wholesale cut unless such beef or part or portion is a beef carcass or a beef wholesale cut as defined in Section 1364.455, for which applicable prices have been established.

(5) On and after April 22, 1943, regardless of any contract, agreement or other obligation, no person shall sell or deliver any ground, chopped or comminuted meat containing any proportion of beef or any miscellaneous beef item and no person in the course of trade or business shall buy or receive any ground, chopped or comminuted meat containing any proportion of beef or any miscellaneous beef

item unless such ground, chopped or comminuted meat is ground beef and such miscellaneous beef item is a miscellaneous beef item as defined in Section 1364.452 (p), for which applicable prices have been established.

(b) Maximum price.

The maximum price for each grade of each beef carcass or beef wholesale cut shall be the applicable zone price determined in accordance with the provisions of paragraph (a) of this Section 1364.451 and specified in Schedule I, minus the required deductions, if any, specified in Schedule II, plus the permitted additions, if any, specified in Schedule III.

Section 1364.452. Schedule I. Beef price zones and applicable zone prices.

(a) Zone 1.

(1) Zone 1 includes the following area: Washington, Oregon, California and Nevada.

(2) Beef carcass and beef wholesale cut prices applicable in Zone 1.

Subject to the provisions of paragraph (k) of this section, the Zone 1 price for each grade of each class of beef carcass and beef wholesale cut shall be the price specified therefor in paragraph (d) hereof (the applicable Zone 4 price) plus \$1.75 per cwt.

(2) Beef carcass and beef wholesale cut prices applicable in Zone 4.

Subject to the provisions of paragraph (k) the applicable zone prices for Zone 4 are as follows:

(All prices are on dollars per hundredweight bases; the price for any fraction of a hundredweight shall be reduced accordingly.)

Steer or Heifer	Choice or AA	Good or A	Commercial or B	Utility or C	Cuttier Canner or D	(Bologna Bulls (Equivalent cutter and canner grade
(i) Beef carcass or side.....	\$20.00	19.00	17.00	15.00	12.50	13.00
(ii) Hindquarter	22.25	21.00	18.25	15.75	12.50	13.00
(iii) Forequarter	18.00	17.25	16.00	14.50	12.50	13.00
(iv) Round	21.75	20.50	18.25	15.50		
(v) Trimmed full loin.....	29.00	27.25	22.50	19.25		
(vi) Flank	12.50	12.50	12.50	12.50		
(vii) Flank steak	23.00	23.00	23.00	23.00		
(viii) Short loin	32.00	29.75	24.75	21.50		
(ix) Sirloin	26.50	25.25	20.50	17.50		
(x) Cross cut chuck.....	18.00	17.25	15.75	14.25		
(xi) Regular chuck	19.50	18.25	17.00	15.00		
(xii) Brisket	15.75	15.75	13.75	13.75		
(xiii) Foreshank	11.50	11.50	11.50	11.50		
(xiv) Rib	23.50	22.25	20.50	18.00		
(xv) Short plate	13.50	13.50	12.75	12.75		
(xvi) Back	20.50	19.25	18.00	15.75		
(xviii) Triangle	17.25	16.50	15.25	14.00		
(xviii) Arm chuck	18.25	17.25	16.25	14.50		

The applicable zone 4 price of each cow carcass or wholesale cut of cutter and canner grade or utility grade shall be the same as the Zone 4 price of the carcass or corresponding wholesale cut of steer or heifer of the same grade; the applicable Zone 4 price of each cow carcass or wholesale cut of commercial grade, or good grade shall be the same as Zone 4 price of the carcass or corresponding wholesale cut of steer or heifer of commercial grade.

The applicable Zone 4 price of each stag carcass or wholesale cut of cutter and canner grade, utility grade, commercial grade or good grade shall be the same as the Zone 4 price of the carcass or corresponding wholesale cut of steer or heifer of the same grade.

The applicable Zone 4 price of each bull carcass or wholesale cut of utility grade or commercial grade shall be the same as the Zone 4 price of the carcass or corresponding wholesale cut of steer or heifer of the same grade. The applicable Zone 4 price of each bologna bull carcass and wholesale cut, which are equivalent to cutter and canner grade are specified above.

The applicable Zone price of each beef carcass or beef wholesale cut which has not been graded or identified by sex mark (required by paragraph (c) of Section 1364.411) when offered for sale, sold or delivered shall be the price of the lowest-priced carcass or corresponding wholesale cut.

(k) For any beef wholesale cut which has been mis-cut or for any piece or portion of beef which has been cut in a manner not authorized by this

Maximum Price Regulation No. 169, the zone price used for the determination of the maximum price shall be the applicable zone price of the lowest wholesale priced wholesale cut.

(o) (2) The fabricated beef cut zone areas 1 to 10 are identical to the beef zone areas set forth in Schedule I (1364.452).

(3) The applicable prices in Zone 1 for fabricated beef cuts and for ground beef and miscellaneous beef items shall be the prices specified in subparagraphs (4) or (5) or (6) hereof respectively (the applicable zone 3 and 4 price) plus the following: Zone 1...\$1.75.

(4) The fabricated beef cut prices applicable in Zone 3 and 4 for sales by a hotel supply house to purveyors of meals, subject to the provisions in paragraph (k) of Section 1364.452, substituting for the purpose of this paragraph (o) the term "fabricated beef cut" for the term "wholesale cut" contained therein, are as follows:

Grade

Fabricated Beef Cuts	Grade			
	Choice or AA	Good or A	Commercial or B	Utility or C
(i) Round, rump and shank off.....	\$30.00	\$28.75	\$24.75	\$20.50
(ii) Boneless rump (butt)	25.00	22.75	21.00	18.75
(iii) Hind shank	11.50	11.50	11.50	11.50
(iv) Boneless round	33.00	31.00	27.25	22.50
(v) Inside (top) round	36.75	34.25	29.75	24.25
(vi) Outside bottom round	36.75	34.25	29.75	24.25
(vii) Knuckle (face)	27.50	27.50	24.25	21.25
(viii) Gooseneck boneless round	32.50	29.75	26.50	24.75
(ix) Strip loin (bone in)	49.50	44.75	36.50	29.00
(x) Boneless strip	59.50	53.75	44.00	34.75
(xi) Trimmed full beef tenderloin	58.25	58.25	49.25	49.25
(xii) Trimmed sirloin tenderloin (butt tenderloin)....	58.25	58.25	49.25	49.25
(xiii) Trimmed tip tenderloin (short tenderloin).....	58.25	58.25	49.25	49.25
(xiv) Boneless sirloin (butt)	36.75	34.25	27.00	21.25
(xv) Top sirloin (butt)	45.75	44.00	35.75	26.25
(xvi) Bottom sirloin (butt)	30.25	27.25	20.75	17.75
(xvii) Boneless chuck	26.75	25.00	23.25	20.50
(xviii) Boneless chuck (shoulder clod out).....	26.00	24.25	22.75	19.75
(xix) Shoulder clod	29.00	27.75	25.75	23.00
(xx) Boneless briskets (deckle on).....	23.50	23.50	20.25	20.25

Grade

	Choice or AA	Good or A	Commercial or B	Utility or C
Fabricated Beef Cuts—(Continued)				
(xxi) Boneless briskets (deckle off).....	\$29.50	\$29.50	\$24.75	\$24.75
(xxii) Oven prepared rib	31.50	29.50	27.25	23.50
(xxiii) Rib short ribs, plate short ribs.....	21.00	21.00	19.25	19.25
(xxiv) Rib, boned, rolled and tied.....	39.25	37.00	34.00	29.50
(xxv) Spencer roll	(1)	(1)	41.50	35.75
(xxvi) Regular roll, (rib eye).....	(1)	(1)	64.50	54.25
(xxvii) Boneless short plate	20.00	20.00	19.00	19.00
(xxviii) Cube steak	22.50	22.50	22.50	22.50
(xxix) Flank steak, scored	25.00	25.00	25.00	25.00
(xxx) Club steaks, bone in	50.00	47.00	38.25	34.00
(xxxi) Boneless strip steaks	61.25	55.25	45.25	35.75
(xxxii) Porterhouse steaks (bone in).....	50.00	47.00	38.25	34.00
(xxxiii) T-bone steaks (bone in).....	50.00	47.00	38.25	34.00
(xxxiv) Boneless sirloin steaks	37.75	35.25	27.75	21.75
(xxxv) Top sirloin steaks	47.00	45.25	36.75	27.00

(1) This grade not permitted to be sold and/or delivered.

(5) The fabricated beef cut prices applicable in zones 3 and 4 for sales by packing or slaughtering plants, packing branch houses, wholesaler's or other selling establishments to purveyors of meals subject to the provisions in paragraph (k) of Section 1364.452, substituting for the purposes of this paragraph (o) the term "fabricated beef cut" for the term "wholesale cut" contained therein, are as follows:

Grade

	Choice or AA	Good or A	Commercial or B	Utility or C
Fabricated Beef Cuts				
(i) Round, rump and shank off.....	\$28.25	\$26.50	\$23.25	\$19.25
(ii) Boneless rump (butt)	22.75	20.50	19.25	17.00
(iii) Hind shank	11.50	11.50	11.50	11.50
(iv) Boneless round	30.50	28.50	25.00	20.75
(v) Inside (top) round	33.50	31.25	27.00	21.75
(vii) Outside (bottom) round	33.50	31.25	27.00	21.75
(vii) Knuckle (face)	26.00	26.00	23.00	20.50
(viii) Gooseneck boneless round	30.25	27.75	24.50	23.00
(ix) Strip loin (bone in)	46.00	41.50	34.50	28.00
(x) Boneless strip	55.25	49.75	41.50	33.50
(xi) Trimmed full beef tenderloin	54.00	54.00	45.00	45.00
(xii) Trimmed sirloin tenderloin (butt tender).....	54.00	54.00	45.00	45.00
(xiii) Timmed tip tenderloin (short tender).....	54.00	54.00	45.00	45.00
(xiv) Boneless sirloin (butt)	34.00	31.75	24.75	18.75
(xv) Bottom sirloin (butt)	28.50	26.25	19.75	16.25
(xvi) Top sirloin (butt)	41.75	39.25	31.75	22.25
(xvii) Boneless chuck	25.00	23.50	21.75	19.25
(xviii) Boneless chuck (shoulder elod out).....	24.00	22.50	21.00	18.50
(xix) Shoulder elod	28.00	26.50	24.75	22.00
(xx) Boneless brisket	22.00	22.00	18.75	18.75

Grade

Fabricated Beef Cuts—(Continued)	Grade			
	Choice or AA	Good or A	Commercial or B	Utility or C
(xxi) Boneless briskets (deckle off).....	\$27.25	\$27.25	\$23.00	\$23.00
(xxii) Oven prepared rib	29.50	27.50	25.50	22.00
(xxiii) Rib short ribs, plate short ribs.....	19.00	19.00	17.25	17.25
(xxiv) Rib, boned, rolled and tied.....	36.50	34.50	31.50	27.25
(xxv) Spencer roll	(1)	(1)	38.25	32.75
(xxvi) Regular roll, (rib eye).....	(1)	(1)	58.75	49.25
(xxvii) Boneless short plate	18.75	18.75	17.50	17.50
(xxviii) Cube steaks	21.50	21.50	21.50	21.50
(xxix) Flank steak, scored	23.00	23.00	23.00	23.00
(xxx) Club steaks, bone in	46.50	43.50	35.50	31.50
(xxxi) Boneless strip steaks	57.00	51.25	42.75	34.50
(xxxii) Porterhouse steaks (bone in)	46.50	43.50	35.50	31.50
(xxxiii) T-bone steaks (bone in).....	46.50	43.50	35.50	31.50
(xxxiv) Boneless sirloin steaks	35.00	32.75	25.50	19.25
(xxxv) Top sirloin steaks	43.00	40.50	32.75	23.00

(1) This grade not permitted to be sold and/or delivered.

Section 1364.453. Schedule II. Amounts which must be deducted from zone prices listed in Schedule I.

As hereinafter provided, the following shall be deducted from the applicable zone prices:

(a) For beef carcasses and beef wholesale cuts not graded by an official grader. For the sale of any beef carcass or beef wholesale cut which does not bear the grade mark and identification of an official grader of the United States Department of Agriculture at the time of sale, the seller shall deduct $12\frac{1}{2}$ per cwt. from the applicable zone price.

(b) Carload discount. For all beef carcasses and/or beef wholesale cuts and/or other meat items subject to this subpart B and Sections 1364.453 and 1364.454, delivered in a straight or mixed carload shipment or sold as a part of a straight or mixed carload sale, the seller shall deduct 25 cents per hundredweight from the applicable zone price.

Section 1364.454. Schedule III. Amounts which may be added to zone prices listed in Schedule I. Subject to the conditions hereinafter provided, the following may be added to the applicable zone price:

(a) For transportation and/or local delivery.

2) For transportation from the point at which the meat was slaughtered in price zone 1 to a distribution point located in the same price zone as the slaughter point, other than another slaughterer, packing or processing plant owned or controlled by the same seller, the seller may add the actual cost of transportation computed at the lowest common

carrier rate for the method of transportation used, but in no event more than 25 cents per cwt.

(3) For local delivery made within a radius of 25 miles from a slaughter plant, packing house, car-route unloading point, railroad unloading station or branch house, to the place of business of a seller at retail, wholesaler (not owned or controlled by the shipper or consignor), hotel supply house (not owned or controlled by the shipper or consignor), or commercial user, or the designated delivery point of a war procurement agency, or other governmental agency; or

For local delivery made within a radius of 25 miles from the place of business of a wholesaler or hotel supply house, to the place of business of a seller at retail, purveyor of meals, or commercial user, or the designated delivery point of a war procurement agency, or other government agency: the seller may add 25 cents per cwt.

(5) For local delivery made from a slaughter plant, packing house, car-route unloading point, railroad unloading station, or branch house, located in Price Zone 1, to the place of business of a seller at retail, wholesaler (not owned or controlled by the shipper or consignor), hotel supply house (not owned or controlled by the shipper or consignor), or commercial user, or the designated delivery point of a war procurement agency, or other government agency, located more than 25 miles from such shipping point; or

For local delivery made from the place of business of a wholesaler or hotel supply house located

in Price Zone 1 to the place of business of a seller at retail, purveyor of meals or commercial user, or the designated delivery point of a war procurement agency or other government agency, located more than 25 miles from such shipping point: the seller may add the actual cost of local delivery computed at the lowest common carrier rate for the method of delivery used, but in no event more than 50 cents per cwt.

(6) Notwithstanding any of the provisions of paragraphs (a) (1) to (a) (5), inclusive, of this Section 1364.454, nothing therein contained shall be construed to permit a total charge for transportation and/or local delivery from the point at which the meat was slaughtered to the place of business or receiving point of a retail seller, purveyor of meals, war procurement agency, or other governmental agency or commercial user of more than 50 cents per cwt. in Price Zone 1. The transportation and local delivery additions permitted in this paragraph (a) are on a hundredweight basis and the charge for transportation and/or local delivery for any fraction of a hundredweight shall be reduced accordingly. The additions specified in this paragraph (a) for transportation and/or local delivery may be charged: Provided, That the seller shall itemize separately on an invoice to the buyer the amount charged the buyer for transportation and/or local delivery, except that if such separate statement of transportation charges is prohibited by local law the seller shall maintain in his own record of the transaction a separate statement of any addition for

transportation or local delivery which is included in the maximum price charged.

(d) Wholesalers' selling addition.

On sales of any beef carcass or beef wholesale cut not obtained through custom slaughtering, a person who at the time of the sale is a wholesaler may add 75 cents per hundredweight to the applicable zone price: Provided, however, That on and after August 9, 1943, no person shall charge the addition permitted by this section 1364.454 (d) unless by such date such person shall have filed with the appropriate regional office of the Office of Price Administration a certified statement that the person: (1) is engaged in the business of buying beef carcasses and/or beef wholesale cuts for resale other than at retail; (2) does not own or control, in whole or in substantial part, any slaughtering plant or facilities and is not owned or controlled, in whole or in substantial part, by another person who owns or controls in substantial part any slaughtering plant or facilities; and (3) is not a hotel supply house or peddler truck seller within the meaning of this Revised Maximum Price Regulation No. 169.

(f) Boxing.

On sales to a seller at retail, purveyor of meals, war procurement agency, commercial user (not wholesaler, branch house, hotel supply house, etc.) war procurement agency, or other government agency, the seller may add 15c per cwt. for packing in boxes.

(g) Peddler-truck selling addition.

On a peddler truck sale involving delivery of not more than 100 pounds of beef in a total delivery of not more than 150 pounds of meats and meat products in any one day from such peddler-truck to any buyer's store door, a peddler may add to the prices specified in Section 1364.452 (Schedule I) the sum of \$1.25 per cwt. This addition shall be in lieu of any local delivery and/or transportation addition permitted in Section 1364.454.

Section 1364.455. Definitions applicable to beef.

(a) When used in this Revised Maximum Price Regulation No. 169 and when applicable to beef, the term:

(1) "Person" means any individual, corporation, partnership, association or other organized group of persons, or legal successor or representative of any of the foregoing, and includes the United States or any agency thereof, or any other government, or any agency of any of the foregoing: Provided, That no punishment provided by this Revised Maximum Price Regulation No. 169 shall apply to the United States or to any such government, political subdivision, or agency.

(2) "Carload" means:

(ii) A shipment by motor truck or trucks to a single delivery point of fifteen thousand pounds or more of fresh or frozen wholesale meat cuts and/or cured meat cuts, meat or processed products and/or carcasses, or any combination of the foregoing, as a single bulk sale transaction; and

(iii) Any single bulk sale transaction wherein the buyer takes delivery at the seller's place of

business of fifteen thousand pounds or more of fresh or frozen wholesale meat cuts and/or cured meat cuts, meat or processed products and/or carcasses, or any combination of the foregoing.

(3) "Beef" means meat derived from the carcasses of bovine animals which does not qualify as veal as defined in Section 1364.470 (3) of this regulation.

(4) "Car-route unloading point" means any point on a car route at which a stop is made for the purpose of transferring meat to the possession of the buyer or to a truck for local delivery to the buyer.

(5) "Distribution point" includes a packing or slaughtering point, packer's branch house, wholesaler's or jobber's or hotel supply house's warehouse, car route unloading point, or railroad unloading station.

(6) "Local delivery means delivery by the seller otherwise than by rail, commencing at the seller's distribution point, or in the case of car routes, at the car unloading point and continuing to the buyer's place of business or other point of delivery.

(8) "Beef carcass" means and is limited to the dressed carcass side or sides of beef which shall be dressed with a first and second tail (caudal) vertebrae, kidney knob or knobs, and hanging tender left on. The beef carcass shall not be broken in any other manner than provided in paragraph (a) (9) of this Section 1364.455.

(9) "Beef wholesale cut" means and is limited to any of the following cuts meeting the following minimum specifications, derived from the beef car-

cass but excluding the offal and any item not included herein (all measurements prescribed herein shall be made with a rigid straight ruler. All cuts shall be made according to the definite guides and measurements specified. Ribs are designated as first to thirteenth, inclusive, counting as the first rib the one which is nearest the neck end of the side.)

(i) "Hind quarter" means the posterior portion of the side remaining after the severance of the twelfth rib forequarter from the side and comprising the round, full loin, including the thirteenth rib, flank, kidney and hanging tender all in one piece, which posterior portion shall be obtained by cutting the beef side between the twelfth and thirteenth ribs, keeping the knife firmly against the twelfth rib while cutting the length of the rib to the point at the end of the rib where the rib joins the rib (costal) cartilage, from which point passing through the cartilage and meat of the flank and short plate in the same straight line, completing the cut.

(ii) "Forequarter" means the anterior portion of the side remaining after the severance of the one-rib hind quarter from the side and comprising the rib, regular chuck, brisket, short plate and foreshank all in one piece, which anterior portion contains the first to the twelfth rib, inclusive. All heart (mediastinal) fat, but no other fat, shall be removed from the forequarter. The skirt (diaphragm) shall not be removed from any cut or part of the forequarter to which it is attached.

(13) "Wholesaler" means a person other than a hotel, supply house or peddler-truck seller who

buys beef carcasses and/or beef wholesale cuts for resale other than at retail and who does not own or control, in whole or in substantial part, any slaughtering plant or facilities and is not owned or controlled, in whole or in part, by another person who owns or controls in substantial part any slaughtering plant or facilities.

(14) "Sales at retail" means sales to the ultimate consumer: Provided, That no wholesaler, processor, packer, slaughterer, branch house, car route, hotel supply house, purchaser for retail, commercial user, purveyor of meals, war procurement agency, or other government agency, shall be deemed to be an ultimate consumer, except that a sale to a purveyor of meals on usual terms by a retailer, at least eighty percent of whose sales of meat during the preceding calendar month were made to ultimate consumers, shall be deemed a sale at retail.

(15) "Peddler-truck sale" means a sale of beef from a truck by a person who purchases beef at or below the maximum price from a seller with whom he has no other financial affiliation or relationship, who takes a delivery at the seller's place of business, and who does not sell or deal in meat in any manner other than sales out of stock carried in a truck, owned and driven by him; provided, that the first record of the transaction is made by the salesman concurrently with the delivery of the products sold.

(b) (2) "Purveyor of meals" means:

(i) Any restaurant or hotel, cafe, cafeteria or other establishment which purchases meats and

where meals, food portions or refreshments are served for a consideration.

ASSIGNMENT OF ERROR No. 30

The court erred in refusing to give the following defendant's proposed and offered instruction to which refusal the defendant within the time and in the manner prescribed by law duly excepted.

DEFENDANT'S REQUESTED INSTRUCTION No. 24

You are instructed that if you find as a fact that the Revised Maximum Price Regulation No. 169 heretofore read to you, is so framed, worded, drawn and set forth as to be incomprehensible or unintelligible to a person of ordinary understanding and intelligence, then you must find the defendant not guilty of violating the provisions of said Maximum Price Regulation No. 169.

ASSIGNMENT OF ERROR No. 31

The court erred in refusing to give the following defendant's proposed and offered instruction to which refusal the defendant within the time and in the manner prescribed by law duly excepted.

DEFENDANT'S REQUESTED INSTRUCTION No. 25

You are instructed that if you find Revised Maximum Price Regulation No. 169 so ambiguous, indefinite, uncertain and unintelligible that it can-

not be understood or comprehended with a reasonable degree of certainty by a person of ordinary intelligence and understanding, you must find the defendant not guilty.

ASSIGNMENT OF ERROR No. 32

The court erred in refusing to give the following defendant's proposed and offered instruction to which the defendant within the time and in the manner prescribed duly excepted.

DEFENDANT'S REQUESTED INSTRUCTION No. 32

You are instructed that if you find from the evidence that the defendant did not make the sales charged in the information, you must find the defendant not guilty.

ASSIGNMENT OF ERROR No. 33

The Court erred in refusing to give the following defendant's proposed and offered instruction to which refusal the defendant within the time and in the manner prescribed by law duly excepted.

DEFENDANT'S REQUESTED INSTRUCTION No. 35

You are instructed that if you are unable to determine from the evidence the maximum prices permitted by Maximum Price Regulation No. 148, 169 and 239 for the grade, type and kind of beef, pork and lamb, charged to have been sold by defendant, or if there is a reasonable doubt in your

mind as to what were the maximum prices permitted therefor by such regulation on the date of each sale defendant is charged to have made, you must find the defendant not guilty.

ASSIGNMENT OF ERROR No. 34

The court erred in refusing to give the following defendant's proposed and offered instruction to which refusal the defendant within the time and in the manner prescribed by law duly excepted.

DEFENDANT'S REQUESTED INSTRUCTION No. 36

If you find from the evidence that no maximum price has been established by Revised Maximum Price Regulation No. 169 for the type or kind or grade of beef carcasses or wholesale cuts alleged, which defendant may have sold or delivered, if any, you are instructed that you must find the defendant not guilty of violating Revised Maximum Price Regulation No. 169.

ASSIGNMENT OF ERROR No. 35

The court erred in refusing to give the following defendant's proposed and offered instruction to which refusal the defendant within the time and in the manner prescribed by law duly excepted.

DEFENDANT'S PROPOSED INSTRUCTION No. 39

If, after a consideration of the whole case, any juror shall entertain a reasonable doubt of the

guilt of the defendant, it is the duty of such juror so entertaining such reasonable doubt to vote for a verdict of "not guilty".

The defendant is presumed to be innocent until proven guilty; that presumption accompanies him throughout the trial; it goes with you to your retirement to consider your verdict and operates until you have arrived at a verdict. This presumption will avail to acquit the defendant unless it be overcome by sufficient proof of his guilt to convince you, and each of you, to a moral certainty and beyond all reasonable doubt of his guilt. You must examine the evidence in the light of presumption of innocence, and unless you find the evidence sufficiently strong to overcome this presumption, and, further, to satisfy you beyond all reasonable doubt of the guilt of the defendant, he is entitled to a verdict of acquittal at your hands.

CONCLUSION

Wherefore, the said Defendant, Clarence O. Flannagan, by reason of the errors aforesaid, prays that the said judgment and sentence against and upon him, may be reversed and held for naugh.

CANTILLON & GLOVER

By JOHN E. GLOVER

Attorneys for Defendant and
Appellant, Clarence O.
Flannagan.

Received copy of the within Assignment of Errors this 20th day of January 1944.

CHARLES H. CARR,
U. S. Attorney
By MARY WENTWORTH

[Endorsed]: Filed Jan. 20, 1944.

[Title of District Court and Cause.]

BILL OF EXCEPTIONS

Be it remembered that on the 15th day of July, 1943, an Information was filed in the above entitled Court.

That on the 21st day of July, 1943, and before the entry of a plea, the Defendant filed a Demurrer to said Information and to each Count thereof, and on the 30th day of September, 1943, an Order was made sustaining said Demurrer and granting the Government leave to file an Amended Information within ten days.

That on the 11th day of October, 1943, an Amended Information was filed.

That on the 16th day of October, 1943, Defendant served and filed a Notice of Motion to Quash and Set Aside said Amended Information.

That on the 16th day of October, 1943, and before the entry of a plea, the Defendant filed a Demurrer to said Amended Information, basing said Demurrer upon the following grounds:

(a) That Count X of said Amended Informa-

tion fails to state facts sufficient to constitute a criminal offense;

(b) That Count X of the Amended Information is uncertain in that it cannot be determined therefrom:

1. What crime, if any, Defendant is alleged to have committed;

2. Whether the sale of the beef alleged to have been sold by Defendant was made by Defendant as a "wholesaler", "peddler truck sale", "independent wholesaler", "hotel supply house", "slaughterer", "packer", or otherwise;

3. Whether the sale alleged to have been made by Defendant was made to a wholesaler, retailer, purveyor of meals or otherwise;

4. In what respects, if any, the purported crime attempted to be alleged in said Count X differs from the purported crimes attempted to be alleged in Counts I, II, III, IV, V, VI, VII, IX and XII of said Amended Information;

(c) That Count X of the Amended Information is indefinite in each and all of the respects in which it is heretofore set forth to be uncertain;

(d) That Count X of said amended Information is ambiguous in each and all of the respects in which it is heretofore set forth to be uncertain and indefinite.

That on the 18th day of October, 1943, Defendant, in open court, pursuant to the aforementioned Notice of Motion to Quash and Set Aside said Amended Information, and arguments on said Motion having been presented by both Defendant and

the Government, the Court made and entered its order denying said Motion, to which Order the Defendant duly excepted.

That on the 18th day of October, 1943, argument was had on the said Demurrer, and the Court made and entered an Order overruling said Demurrer, to which Order the Defendant duly excepted. [2*]

That on the 23rd day of October, 1943, Defendant served and filed his Notice of Motion for an Order directing the Government to serve and file a Bill of Particulars, specifying the following findings relative to Count X (other Counts are omitted as said Count is the only Count upon which judgment and sentence was pronounced):

(a) What grade of beef Defendant is alleged to have sold, and whether such beef was a "beef carcass" or a beef cut, or beef cuts, and if a beef cut, or beef cuts, the kind or type of cut or cuts;

(b) What the maximum price is, was or is claimed to be, or have been, for the beef alleged to have been sold by Defendant;

(c) Whether the sale of the beef alleged to have been sold by Defendant was made by Defendant as a "wholesaler", "peddler truck sale", "independent wholesaler", "hotel supply house", "slaughterer", "packer", or otherwise.

That on the 1st day of November, 1943, pursuant to said Notice of Motion for Bill of Particulars, said Motion was made and heard, which Motion was by the Court denied, and the Defendant duly excepted to the Court's ruling thereon.

*Page numbering appearing at foot of page of original Bill of Exceptions.

That on the 18th day of October, 1943, Defendant entered his plea of not guilty to each and every Count of said Information.

That said cause came on regularly for trial on the 9th day of November, 1943, the Honorable Paul J. McCormick, Judge presiding, with a jury, the United States of America being represented by Ernest A. Tolin, Esq., Assistant United States Attorney, and the Defendant being represented by William Katz, Esq.

Before the selection of a jury had commenced and outside of the hearing of the jury veniremen, the Government moved the Court to dismiss Counts I, II, III, IV, V, VI, VII and IX, which Motion was then and there granted and the trial was ordered to proceed on Counts VIII, X, XI and XII, and by reason of acquittals [3] on Counts VIII, XI and XII, the charge contained in Count X is the only matter involved in this appeal.

That the jury was duly impanelled and sworn, after which the following proceedings were had:

JAMES KILDUFF

called as a witness by and on behalf of the Government, having been first duly sworn, was examined and testified as follows:

I live at Anaheim, California. On the 24th, 25th and 28th days of June, 1943, I was in the retail meat business in the Greater Anaheim Market in Anaheim, under the name of Kilduff's Quality

(Testimony of James Kilduff.)

Meats. I purchased meat and resold it to the consuming public. I first met the defendant two or three years ago but he did not supply me with meat prior to June 24, 1943. On June 24, 1943, I had a conversation with Mr. Flannagan at my market.

“Q. Tell us what you said and what he said about it, if you recall.

Mr. Katz: Objected to as incompetent, irrelevant, and has no bearing on the issues; no foundation; no corpus delicti has been established.

The Court: Overruled. You may answer the question.

Mr. Katz: Note an exception, please.”

He said that he heard I wanted some meat and said he could supply me a little but probably not all I needed and said there was an overage. He did not tell what it was for. I bought some meat. He had a truck there at the time, it was in the alley, I went out and saw it. I couldn't see whether there was any sign on the truck. I was looking at the meat, I saw the meat in the truck. Government Exhibit No. 1, for identification, is an invoice Mr. Flannagan [4] gave me at that time. When I made the purchase Mr. Flannagan carried the meat in and put it in the ice box. It was at that time that the invoice, Government Exhibit No. 1, for identification, was given me. That is the invoice on the meat of that day; I received the meat that is listed on the invoice. I paid Mr. Flannagan the price that appears on that invoice. There

(Testimony of James Kilduff.)

wasn't much of anything said, only he told me how much other in cash I owed, that was for him. I don't remember how much I gave him on that invoice but it figured out about 7c a pound on the beef.

“Mr. Katz: Just a minute. If the Court please, I move to strike that last portion of the statement as not responsive to the question; as a conclusion of the witness; irrelevant, incompetent and immaterial.

The Court: Motion denied.”

I paid him some money at that time; I gave him a check at that time; I gave him some money over and above the amount of the check. I suppose the amount of the check is the amount of the invoice; I don't remember. I had not made any purchase of meat from him prior to that time. This transaction of the 24th of June, 1943, was the first transaction of a business nature I had ever had with defendant Flannagan.

“Mr. Tolin: I offer in evidence Government's Exhibit 1, for identification.

Mr. Katz: Objected to, if the Court please. There is no foundation laid for it; incompetent, irrelevant and immaterial; it has no bearing on the issues in this case.

The Court: Overruled. [5]

The Clerk: Government's 1, in evidence.

Mr. Katz: Exception, if the Court please.

(The document referred to, heretofore marked as Government's Exhibit 1, for identification, was received in evidence.)”

PHONE NEWPORT BEACH 1790

Newport Heights, Calif.

194.3

Sold to

Kilduff Mkt N^o 7801

DESCRIPTION	WEIGHT	PRICE L.B.	AMOUNT
1. <i>hivers</i>	<i>48</i>	<i>98%</i>	<i>26% 2.57</i>
2. <i>154-68</i>	<i>41.58</i>	<i>610</i>	<i>22% 13.57</i>
3.	<i>196</i>		
4.			<i>130</i>
5.			
6.			
7.			
8.			
9.			
10.			
11.			
12.			
13.			
14.			
15.			
<i>Pair 130</i>			
<i>130</i>			
TOTAL			
SIGNED			

No. 16107 EV
42
V3.
Flammagan
42 EXHIBIT
F. 1 16107
F. 2 119.1043
F. 3 119.1043 Clerk:
F. 4 119.1043 Deputy Clerk

ADMITTED

(Testimony of James Kilduff.)

“Mr. Katz: Just a moment, counsel, if I may. If the Court please, counsel for the Government is going into a transaction on the 25th, and has offered in evidence—on the 24th, and has offered in evidence an invoice of the 24th, and there is no offense charged in this Information, there is no such thing before this Court pertaining to any offense committed on the 24th day of June, 1943.

The Court: Mr. Katz, you haven’t been in the courtroom, recently, I think. You must not argue matters before the Court.

Mr. Katz: I don’t. It isn’t a matter of argument; it is a motion, if the Court please, to strike all that has gone in. I merely make the motion to strike it out on the ground that the matters now gone into on the 24th are not charged in any information in the complaint.

The Court: You haven’t made that motion until now.

Mr. Katz: Yes, your Honor. I meant to.

The Court: The motion is denied.”

On that occasion I had a conversation with the defendant, Mr. Flanagan, about future deliveries of meat to my market. I said if he could to bring me another beef the next day. I saw him on the next day, that is on the 25th day of June of this year at my market, he just brought the beef in. I received an invoice, Government’s Exhibit No. 2, for identification, from him at that time; I also received from him the [6] items that are listed on that invoice.

(Testimony of James Kilduff.)

He carried the items into my place of business. I paid him the amount that appears on that invoice. Government's Exhibit No. 3, for identification, is the check on that invoice. After I wrote the check, Government's Exhibit No. 3, for identification, I gave it to Mr. Flannagan. As to whether I gave him anything else at that time my answer is that I gave him some money. There was nothing said by him or by me as to the sum that I gave him at that time. I gave him Government's Exhibit No. 3, for identification. He did not do any calculating in my presence; the way I determined how much money to give him other than the amount that appears on the check was that he told me how much. I do not remember the amount of money nor the approximate amount of money. I don't remember how it figured out in money. Mr. Flannagan did not give me any memorandum at the time. No one else was present. Government's Exhibit No. 3, for identification, was offered and received in evidence.

ADMITTED

Handwritten receipt or invoice with fields for date, time, and amount. The date is 6/11/53, and the amount is \$132.00. The word "Hundred" is written in the amount field.

Bank of America stamp with fields for date, time, and amount. The date is JUN 12 1953, and the amount is \$132.00. The word "Hundred" is written in the amount field.

GREATER ANAHEIM MARKET
MEAT DEPARTMENT
820 E. CENTER STREET ANAHEIM

No 4656

ANAHEIM, CALIF. 6 - 25 1043

TO THE
ORDER OF

West Coast Meat

\$132

72

One Hundred Thirty Two

72/100

DOLLAR

90-369 ANAHEIM BRANCH 90-569

BARBARA OR JAMES R. KILDUFF

Bank of America
NATIONAL TRUST ASSOCIATION
ANAHEIM, CALIFORNIA

BY James R. Kilduff

(Testimony of James Kilduff.)

I obtained Government's Exhibit No. 2, for identification, from Mr. Flannagan. As to item one on that Exhibit No. 2, for identification, I received ox tails; as to item 2 of that Exhibit, I received brains; as to item 3, I received four hearts; as to item 5 on that Exhibit, I received tongue; as to item 6, which appears in a circle, I received a whole beef. I didn't receive a half, I received that item 6, the steer, from Mr. Flannagan.

Government's Exhibit No. 2, for identification, was then offered in evidence with a request that the Clerk cover the back part of it with a piece of paper [7] so that the back part would not come to the attention of the jury. Government's Exhibit No. 2, for identification, was then received in evidence. (The Clerk covered the back of the Exhibit so that it was then in the condition, it is in now.)

WEST COAST MEAT COMPANY

PHONE NEWPORT BEACH 1790

Newport Heights, Calif.,

1943

Sold to

No 7809

DESCRIPTION	WEIGHT	PRICE LB.	AMOUNT
1. Pork 1	✓ 6 ⁰⁰	15	70
2. Bacon 2	7 3 ⁴⁰	10 ⁰⁰	39
3. Ham 4	26 6 ⁷⁰	18 ⁰⁰	119
4. Liver 5	54 10 ⁰⁰	26 ⁰⁰	280
5. Tongue 5	✓ 8 ⁷⁰	25 ⁰⁰	215
6. 1/2 Stk 6.8	3836 56 ⁰⁰	22 ⁰⁰	12549
7.	3970		
8.			
9.			
10.			13212
11.			
12.			
13.			
14.			
15.			
TOTAL			

NO 6107 Ex.
11/11
Hansen
2 1/2
11/11 1943
M. Hansen

ADMITTED

(Testimony of James Kilduff.)

At that time I asked Mr. Flannagan if he could bring me another beef Monday. The Monday to which I refer was the 28th of June. I saw the defendant on that occasion at my market; just he and I were present. On that occasion, the 28th of June, I received from defendant the beef that is described on Government's Exhibit No. 4, for identification, which is the invoice the defendant gave me at the time that sale was made. Mr. Flannagan delivered the meat and carried it to my place of business from the truck. He gave me the invoice after he carried the meet in as part of the same transaction. I actually received the beef that appears on the invoice as item 1. I gave Mr. Flannagan a check at that time. Government's Exhibit No. 5, for identification, is that check. I gave him something else at that time; I don't know how much it was. I don't remember how it figured out. He didn't say anything, I just gave it to him. I don't remember the approximate amount, I can't remember numbers that long.

"Mr. Tolin: I offer in evidence Government's Exhibits 4 and 5, for identification.

Mr. Katz: Objected to, if the Court please; incompetent, irrelevant and immaterial.

The Court: Overruled.

Mr. Katz: Exception.

The Clerk: Government's Exhibits 4 and 5 in evidence. [8]

(The document referred to, heretofore marked as Government's Exhibits 4 and 5, for identification, were received in evidence.)"

WEST COAST MEAT COMPANY

PHONE NEWPORT BEACH 1790

Newport Heights, Calif., 6/28 1943

Sold to K. J. Duffie Mkt No 7819

DESCRIPTION	WEIGHT	PRICE LB.	AMOUNT
1. <u>1 Beef 6.8</u>	<u>425</u>	<u>20 1/4</u>	<u>86 07</u>
2. <u>2890</u>			
3.			
4.			
5. <u>2 1/3</u>			
6. <u>20 1/4</u>			
7. <u>172 60</u>			
8. <u>53</u>			
9. <u>173 13</u>			
10.			
11.			
12.			
13.			
14.			
15.			
TOTAL			

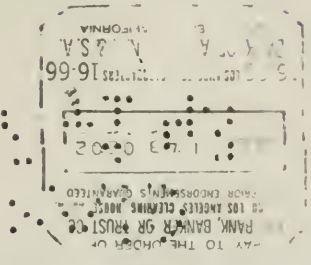
No. 16107 Ev.
US
 vs.
Rannagan
US
 No. 4
 Filed 11/9/43
M. H. Hansen

ADMITTED

ADMITTED

2161
778
GA
N

WEST COAST MEAT CO.



GREATER ANAHEIM MARKET

No 4658

MEAT DEPARTMENT

229 E. CENTER STREET ANAHEIM

ANAHEIM, CALIF. 6-28 1943

PAY TO THE ORDER OF

West Coast Meat Co.

\$86.07

Equity Ltd

DOLLARS

90-368 ANAHEIM BRANCH 90-369

BARBARA OR JAMES R. KILDUFF

Bank of America
NATIONAL TRUST AND SAVINGS ASSOCIATION
ANAHEIM, CALIFORNIA

BY James R. Kilduff

(Testimony of James Kilduff.)

“Mr. Tolin: May I now pass to the jury Exhibits 2 and 3?

The Court: Has that been properly protected?

Mr. Tolin: Yes, Your Honor. Exhibit No. 2 now has the back portion thereof covered with paper.

The Court: You have seen that, have you, Mr. Katz?

Mr. Katz: I haven't since it has been covered.

Mr. Tolin: I will show it to you now, Mr. Katz.

The Court: You may show it to the jury.”

I had a conversation with someone from the Office of Price Administration on or about the 28th of June, this year.

“Q. At that time did you give a statement to that person? A. Yes.

Mr. Katz: Objected to, if the Court please. It is incompetent, irrelevant and immaterial and calls for hearsay, matters that have no bearing on any issue in this case, if the Court please.

Mr. Tolin: May I explain, your Honor? It is a preliminary question.

The Court: Very well. Overruled.

Q. By Mr. Tolin: Mr. Kilduff, I am showing you now a two-page memorandum of some sort written in ink on yellow paper. Will you look that over and see if it refreshes your memory on any subject that I have asked you about here this morning? [9]

Mr. Katz: If the Court please, I am going to object to that as incompetent, irrelevant and imma-

(Testimony of James Kilduff.)

terial; that counsel cannot impeach his own witness. This witness is a Government's witness. It is leading and suggestive. I know that it is proper, if the Court please, for a witness to refresh his memory if he cannot recall an independent fact; but to utilize this method of impeaching—and that is what it amounts to—one's own witness, I think it is improper, and I make my motion on that ground, if the Court please.

The Court: May I see that? I don't know what it is.

Mr. Katz: I haven't seen it either.

The Court: Show it to counsel.

Mr. Tolin: Let me say the purpose is not impeachment, but to refresh his memory.

Your Honor, would it be, perhaps, appropriate to have it marked for identification? And I will take it from the file which contains other matters.

The Clerk: Government's Exhibit 6, for identification. (Attached hereto on following page.)

(The document referred to was marked Government's Exhibit No. 6, for identification.)

6/28/43

This is a statement of J. R. Kibuff, owner of the Greater Anaheim market located at 225 E. Center St. Anaheim. This statement is given willingly because I wish to help in clearing up a black market operation in meats.

Because the Manning Parking Co. closed up, I was unable to buy any fresh meat for my butcher shop. I was told by another butcher that I could buy meat from the West Coast Meat Co. of Milpitas Heights Calif. if I was prepared to pay over and above the correct selling price.

On June 25th 1943 a man drove up in the back of my market in a green panel truck, there was no name on this truck. The man had some meat in this truck, I purchased 564 pounds of Grade A. meat on this date. The total amount of the invoice for all meats purchased on this

Page two

date 1000 \$132.72. I paid this amount by check, then I paid the driver a bonus, or side money of 79 a pound extra for the 564 pounds of beef. I paid him in cash for this the amount. It come to a total of \$39⁴⁸/₁₀₀. I also purchased 425# of Grade B Beef on June 28th - 1943. I paid this in cash \$78.19. amount of \$86⁰⁷/₁₀₀ in check then I paid the same driver \$29⁷⁵/₁₀₀ in cash.

The meat in both these cases were suspected meat - the last purchase of meat was stamped with inspection stamp # 359.

This statement consists of two pages, I hereby certify that all of this is true to my best knowledge. I have read both pages. It is understood by me, that this statement is to be treated confidentially until such time as it may be necessary to appear in court.

E. C. Gorman
Witness

James R. Kilduff
Owner meat dept

Witness

(Testimony of James Kilduff.)

The Court: The Court has inspected the document. Is there a question pending?

(The question was read.)

The Court: Overruled.

Mr. Katz: May I take the witness on voir dire with respect to making that memorandum?

The Court: No, there is nothing yet to take him on, Mr. Katz. There is nothing before the jury so far as that is concerned, excepting his statement that it [9A] does refresh his recollection.

Q. By Mr. Tolin: For the purpose of the record I now show this to you again, and it is now marked as Exhibit 6, for identification. Did you answer the question, Mr. Kilduff? Will you do so?

Mr. Tolin: Will you read it, Mr. Reporter, so he will have it?

(The question was re-read.)

The Court: When you have done so, answer the question categorically, Mr. Kilduff, yes or no.

The Witness: Yes.

Q. By Mr. Tolin: Is your memory now refreshed, Mr. Kilduff, as to the amount that you paid to Mr. Flannagan in addition to the check that you gave him on the 25th day of June of 1943?

A. Well, just what it says there.

Q. Tell us.

Mr. Katz: Just a moment, if the Court please. I will object to what it says on the paper.

The Court: Yes, that will go out, gentlemen. You disregard it.

(Testimony of James Kilduff.)

Q. By Mr. Tolin: Tell us how much you paid him over and above the amount of the check that you gave him on the 25th of June.

Mr. Katz: Objected to, if the Court please; incompetent, irrelevant and immaterial. It has already been asked and answered.

The Court: Overruled.

Mr. Katz: Exception noted.

The Witness: \$39.48.

Q. By Mr. Tolin: Is your memory now refreshed, Mr. Kilduff, as to the amount you paid him on the 28th day of June, 1943, over and above the amount of the check? [9B]

A. It is on there. \$29.75.

Mr. Katz: Just a minute, if the Court please. I will move to strike for the purpose of the objection.

The Court: That may go out. Disregard it, gentlemen.

Q. By Mr. Tolin: Mr. Kilduff, is your memory now refreshed as to the amount that you paid over and above the amount of the check on the 28th of June, 1943? Please tell us yes or no.

A. Yes.

Q. What amount did you pay over and above the amount of the check on that date; that is to say, on the 28th day of June, 1943? A. \$29.75.

Q. What is this that I have shown you here, Exhibit 6, for identification?

A. The statement that I gave on that day.

Q. To whom?

Mr. Katz: Objected to, if the Court please; in-

(Testimony of James Kilduff.)

competent, irrelevant and immaterial. The statement is hearsay.

The Court: Sustained.

Q. By Mr. Tolin: What was the date on which you gave this statement?

A. 28th of June.

Cross-Examination

By Mr. Katz:

I have been in the retail meat business in Anaheim, California, for nine years. I became acquainted with the defendant Flannagan about three years ago but did not transact business with him then. Prior to the 24th of June, I had called a party to tell him to have Flannagan come to see me. Mr. Flannagan did not come to see me prior to the time I had gotten in touch with someone and asked to have Flannagan come to see me. Mr. Flannagan did not solicit my business. My meat supplier was out of business at that [9C] time. I was left without meat. Mr. Flannagan came to see me at my invitation on June 24, 1943. At that time I explained my predicament to him. I asked him to help me out. At that time I had no meat at all. I asked him to please spare me some off his truck if he could, if he had something to sell. He told me that in order to do so he would have to take it from some other customer, that everything he had on the truck that particular day had been ordered and he was making his deliveries; that if he helped me out he would have to take it away from some other customer. Mr. Flannagan told me that it would

(Testimony of James Kilduff.)

cost me more to buy meat from him than it would cost me if I went down and got it from the packing house. He told me that there were certain additional charges that he would make and that he could make by reason of the fact that he delivered his meat. As to whether he told me that he was entitled to certain charges over and above what I would have to pay if I went down and got it from the packing house because of the different status or that he was permitted to add on because of the way he transacted his business, my answer is that I think he said about that. I was interested in the meat. I don't remember. I wasn't concerned so much with what he told me about prices as I was in getting the meat that he would supply to me, that different charges could be made for the same meat. He told me that if I would go down to the packer and get the same thing that it would cost less than he would charge me. He told me that if there was any way for me to get it from the packer I should do it. We did not discuss the individual prices of the items listed on the invoice. I paid the invoice of June 24, Government's Exhibit No. 1. As to whether the check was for the sum of \$138.25, my answer is that it was. That is the amount [10] that is the total of the items, that is shown on the invoice of June 24. At the time Mr. Flannagan received the check he marked the invoice paid and handed it back to me. As to whether I recall in addition to giving Mr. Flannagan the check whether I gave him any cash or other consideration, my answer is yes.

(Testimony of James Kilduff.)

I recall it from my own recollection and memory. I don't know how much it was. I have no way of knowing what it was, except my recollection. Mr. Flannagan did not tell me that additional sums I would be required to pay were reflected in the invoice. He told me he would do the best he could to help me out. He told me he would try to get as much meat for me as he could and on the following day would come with a delivery and on that day he brought me the items shown on the invoice marked Government's Exhibit No. 2. I received all of those items. I did not discuss the individual prices with Mr. Flannagan. I paid for that shipment of June 25 by the check which is marked as Government's Exhibit No. 3. When Mr. Flannagan presented me with the invoice I wrote out the check for the amount shown on the invoice and handed it to Mr. Flannagan. At that time I handed Mr. Flannagan the other consideration but I don't recall the amount; I can't recall the amount that long ago. I don't know whether the additional amount was for any particular item on the invoice. I don't know what it was for. Mr. Flannagan told me that he would have to select the meat for me; he didn't tell me where he obtained his merchandise. I didn't know how he operated. Item 6 on Government's Exhibit No. 2, the invoice of June 25, refers to a Grade A, one-half steer beef, but as a matter of fact on that date I received an entire carcass of [11] beef, the one-half must have been an error, but I didn't receive any additional meat in weight. The

(Testimony of James Kilduff.)

weight there is right, only this should have been one beef instead of half a beef. The beef weighed 564 pounds.

Concerning the invoice of June 28th, Government's Exhibit No. 3, I received only one item, namely, one steer. I gave a check for the amount shown on the invoice and an additional sum, the amount of which I cannot recall and I don't know what the additional sum was for. I was visited by two Office of Price Administration investigators on June 28, 1943. I have not been charged with violation of any Office of Price Administration regulation, nor have I been told that I was violating any regulation in the operation of my business. Upon receiving the beef I broke it up into items and put it in my case, and as soon as I could marked the item with price and grade.

Concerning Exhibit No. 6, for identification, the following proceedings were had:

“Q. Now, Mr. Kilduff, you were shown a statement to refresh your recollection, and then made certain statements after having read it. Isn't it true that your testimony with reference to the amounts that you then gave were given entirely from the memorandum, that you had no recollection of those amounts?

A. The only recollection I have is how much a pound it was. I don't have how much it figured out. I have the round figure in my mind of how much a pound it was on the beef.

Q. And even after reading this statement you

(Testimony of James Kilduff.)

do not at this time know what the amounts were that [12] you state that you gave Mr. Flannagan?

A. Well, there was two of them there, and I don't remember just what they were, no sir.

Q. You still don't remember? A. No, sir.

Q. And the statement that Mr. Tolin showed you did not refresh your recollection as to what those amounts were?

A. Well, they did when I read it. But I can't remember them right now. I remember the 7 cents.

Q. When you read it, Mr. Kilduff, you merely read the figures shown on the statement, is that right? A. That's right."

"Q. Were you told by the O.P.A. investigators that you were violating the regulations in not having price and grade on your merchandise in your cases?

Mr. Tolin: To which we object as irrelevant and immaterial.

The Court: Sustained."

A. No charges have been filed against me. I do not have any agreement with the United States Attorney relative to not filing charges. I have not talked to anybody in Anaheim about the transaction.

"Q. Did you ever talk to anyone at your home about it?

Mr. Tolin: Objected to as irrelevant and immaterial.

The Court: Sustained."

ROLAND H. RICHARDS

called as a witness by and on behalf of the Government, having been first duly sworn, was examined and testified as follows: [13]

I live in Anaheim; I have a retail meat market located at 400 Los Angeles Street in Anaheim. I am in charge of it part of the time and when I am not there Mr. Smith, my helper, has charge. I was the operator of that market on the 3rd of June, 1943. I wasn't there that particular day. I know Mr. Flannagan. I sell regular meat products in that market, beef, pork and veal; it is a retail market. Retail and a very little restaurant; I don't operate a restaurant there. Between the 28th and the 25th of July and the first of July, 1943, I had a conversation in my market with Mr. Flannagan, the defendant, about the amounts he had charged me for beef products. He came and said, "I understand you are short of beef."

I said "Am I short of beef? I sure am. I just can't get any meats at all. I sure would like to satisfy these people here. I have been in business here a long time, and anything you can do for me I sure would appreciate it."

He said, "Well, I can let you have meat, but it is going to cost you a little *coverage*."

I said, "What do you mean by that, Mr. Flannagan?"

He said, "Well, I will have to select your beef and I will have to truck it down here for you and, of course, that is going to cost some overage." I

(Testimony of Roland H. Richards.)

didn't ask him the amount or anything like that. I said, "O. K." "I will be glad to have the beef."

I told him to bring me some. We didn't make a purchase from him that particular day that I remember of.

The Government had marked for identification, the following Exhibits: [14]

Exhibit No. 9, invoice dated June 3, 1943;

Exhibit No. 10, a check dated June 3, 1943;

By the Witness:

I bought the meat listed on Government's Exhibit No. 9 for identification, from the defendant Mr. Flannagan. I wasn't there when it was delivered. Mr. Smith, who is in the back of the room here, was there. He worked for me and he was the manager of the market during the times when I wasn't there. I had signed a check, which I recognize as Government's Exhibit No. 10, for identification. It was not written out at the time I signed it. I signed it in blank; just my signature, Rich's Market, and left it for him to pay for the meat if it happened to come that day. We didn't know whether we would get it or not. We just had the gentleman's promise. I didn't know at the time I signed the check what amount would be written in. As to whether I ever paid Mr. Flannagan any money for the meat which appears in Government's Exhibit No. 9, for identification, other than the amount that appears on Government's Exhibit No.

(Testimony of Roland H. Richards.)

10, for identification, my answer is that I don't remember; I wasn't there that day. I may have later in the week, I can't recollect. I purchased other meat from the defendant Flannagan after that and was present when some of that meat was delivered.

"Q. When was the first time that that occurred, telling us as nearly as you can?

Mr. Katz: If the Court please, may I at this time interpose an objection to going into any transactions other than the transaction that is specified in the count in the information, if the Court please, as to this matter is Count 8; and we object to going into [15] other transactions other than the one before the Court.

The Court: I think evidence of system is admissible. Overruled.

Mr. Katz: Exception.

The Court: Answer the question, please.

The Witness: I can't say exactly."

I imagine it was within the next week, I can't state the day, just Mr. Flannagan and myself were there. Mr. Smith was there but wasn't around with Mr. Flannagan and I at the particular time. On that occasion I was presented an invoice by the defendant. All that was said then was that the meat was brought in and he received his money and that is all there was to it. Whatever the invoice come to that is what he got. As to whether I paid him some overcharge. I did down through the first time that we dealt. As to when the first time was I

(Testimony of Roland H. Richards.)

wish I could remember; that would have been the month of July or in June, I imagine of 1943. All I can remember is the day he brought the meat in. I don't remember the particular day it was. He just brought the meat in and carried it to the ice box and I paid him. There was not very much conversation. I paid him the amount of the invoice and there was that holding charge he told me about, he said he was entitled to that. I imagine I paid him that. I continued to deal with him on that basis about three months, I don't know exactly.

“Q. How often were purchases made by you from the Defendant Flannagan on that basis?

Mr. Katz: Objected to, if the Court please, irrelevant, incompetent and immaterial; it is going far beyond the issues on Count 8 of the information. [16]

The Court: Overruled.

The Witness: I couldn't say.

The Court: Did you answer that?

The Witness: I just couldn't say. I don't know.

Mr. Katz: Exception.”

There is times during that period of time that we purchased something from him every week. There is times that we purchased more than once a week. There were transactions during that period that I didn't pay him the overage. There was times when we would be awfully busy there and that has happened a good many times. We were so busy we couldn't hardly talk to him, he would just bring it in and I would make out the check and he said,

(Testimony of Roland H. Richards.)

“I will come back on the next trip.” And on the next trip I would go ahead and fix up the deal. That is all there was to it. He probably picked up the money that I hadn’t paid him on the previous trip or he would bring other meat in and I would pay him for that. On the previous trip he would have been paid the invoice amount of the meat. I checked to see whether the meat that was billed on Government’s Exhibit No. 9, for identification, had in fact been delivered. I was there the following morning; it was in the ice box.

“Mr. Tolin: I offer Exhibit 9, for identification, in evidence.

Mr. Katz: Objected to, if the Court please; no foundation for it; incompetent, irrelevant and immaterial.

The Court: Overruled: It will be received.

Mr. Katz: Exception noted.

(The document referred to, heretofore marked Government’s Exhibit 9, for identification, was received in evidence.)” [17]

WEST COAST MEAT COMPANY

PHONE NEWPORT BEACH 1790

Newport Heights, Calif., 6/3 1943

Sold to Rich's Mkt No 7668

DESCRIPTION	WEIGHT	PRICE LB.	AMOUNT
1. 15 lbs. Sir	640	24	
2. 3328			155.20
3.			
4.			
5.			
6.			
7.			
8.			
9.			
10.			
11.			
12.			
13.			
14.			
15.			
TOTAL			

No. 16107 Cr.
W.C.
 VS.
Flammagan
Boots EXHIBIT
 No. 9
 FILED 7/9 1943
 S. M. J. Clerk
 By W. Hansen
 D. C.

ADMITTED

(Testimony of Roland H. Richards.)

Cross-Examination

By Mr. Katz:

I have been in the retail business, in my own business about four years. Prior to that I worked in shops owned and operated by others over a period of 15 to 16 years. I have known defendant Flannagan since the end of May, 1943. The 3rd of June, 1943, was the first time I had any business with him. I don't remember that I asked Mr. Flannagan or asked someone to have Mr. Flannagan to come to see me. The only thing I remember is that I was eating down at one of the restaurants and I said, "I sure would like to get hold of some meat." I don't know whether anyone down there bought meat from him or not. During that period of time I let everybody know that I would like to get some meat; I needed it bad. When Mr. Flannagan came to see me he told me that he could not supply me with meat, that he was having a difficult time supplying his customers that he had been doing business with over a period of time. He told me that if I needed meat my best bet was to go down to Vernon or to the other packing house district, and go to the various packing houses until I gathered together some meat. He said something to the effect that he didn't want to take on any customers or accounts. He said that if I did go down to the packing house to get meat it would be cheaper than I could get it from him. He told me that if he were to supply me with meat of any quantity I would have to pay him an overage over and above what

(Testimony of Roland H. Richards.)

he would have to pay the packer. He told me that he charged more than packers did. As to whether he told me that he was permitted to charge more than packers charge I don't remember. I do remember that he told [18] me he was permitted to charge an overage over what the packers could charge for the delivery of meat. He told me that he could make a charge because of the difference between the type of business he operated and the way the packers operated. I was not present in my shop when the delivery represented on Government's Exhibit No. 9 was made; that was my third wedding anniversary. I wasn't in the shop at all at the time that invoice was presented or when it was paid. Because of the fact that I wasn't going to be there I signed some checks in blank so that Mr. Holly Smith, my employee, could fill in the checks and pay whatever had to be paid during that period of time. Mr. Smith received the delivery that was made by Mr. Flannagan on June 3rd. I know that that delivery was paid by check. I returned to my shop the next morning and went into the ice box and checked it. I did not check to determine the amount of the invoice. So far as I know the only payment that was made for the delivery of June 3rd is represented by the check. As to whether I did on June 3rd or some other time pay Mr. Flannagan money in addition to the check that was made by Mr. Smith for the invoice of June 3rd my answer is that I couldn't say, I don't remember. I don't remember making any payment

(Testimony of Roland H. Richards.)

other than the amount shown on the invoice on that particular date because I wasn't there. Sometime subsequent to June 3, 1943, representatives of the Office of Price Administration visited me, I think that was around the first week in July. There were two representatives. The representatives of the Office of Price Administration said I wasn't immune to a charge of Office of Price Administration violations, [19] in other words, that I could be charged. Three Office of Price Administration investigators visited with me at a later time. They took me up to my home and looked at my books. No charges of any kind have been filed against me. No threats or promises have been made to me in connection with my testimony here. Only that those two gentlemen said I probably would be a party to the crime. They did not say that if I would string along with them to get Flannagan they wouldn't do anything to me, not in those particular words. They said that they would see that I got more meat if I would let them know that I needed more meat. Mr. Valance told me that. He said that he would be able to get me more meat; he thought that things would break now and that I could get more meat, and he said that this thing would all clear up. Mr. Gorman of the Office of Price Administration talked with me at that time. It was all so very confusing, I don't remember just exactly what Mr. Gorman said. He said so much so fast I couldn't follow him. Mr. Gorman and Mr. Valance told me they weren't after the little fellow. I don't remem-

(Testimony of Roland H. Richards.)

ber that either of them told me that I was under arrest. They took me to my home to look at my books. They went through my books there. I was permitted to call my attorney when I asked to do so but somebody notified Leo from the shop and he came down. He is my attorney.

Re-Direct Examination

By Mr. Tolin:

I have read Government's Exhibit 11, for identification. It is a statement I gave the Office of Price Administration officers on July 2 of this year.

7/2/43.

This is the statement of P. H. Richards
of 543 So Ohio St. Anaheim. Calif.

This statement is given willingly and
freely to the United States Government
I have been buying meat from
the West Coast Meat Co, for some time.
Several weeks ago I was told by C.
Glennigor that his meat cost him
more, and he would have to charge
me more for meat.

I have paid for the fresh
meat I have purchased from Glennigor
that the invoice called for by
check, the Bonus, or side money
I have paid in cash, always to
C. O. Glennigor.

My wife keeps my books
and she is familiar with the amounts
I have had to pay off, I wish to
change this. My wife does not know
that I have to pay off. I tell her
what amounts of fish I pay out,
and tell her that they are for chickens
fish etc.

over

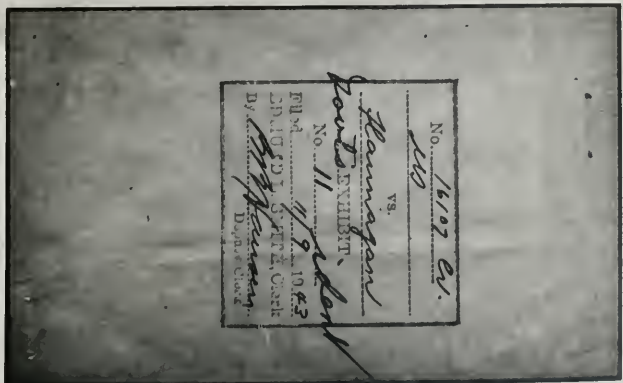
She then enters them in the books in this manner.

I have been forced to pay these amounts of side money, in order to keep my butchery shop open. Mr. Gammion has told me that he had to charge me more for meat because he in turn was forced to pay side money, or extra money to the people he purchased the meat from.

I feel that I am glad this entire matter is over, my mind is made easier, and I feel that I can now engage in the meat business in a clean way. This is the second page, of a two page statement.

George J. Veltman
Witness
S. L. Gorman
Witness

R. H. Richard
543 So. Ohio St. Indian
400 N. 100 Angeles St. Indian



(Testimony of Roland H. Richards.)

“Q. By Mr. Tolin: I will ask you now, Mr. Richards, [20] do you recall more fully, since you have read this statement, what those conversations were with Mr. Flannagan?”

Mr. Katz: If the Court please, I am going to object to that. It is not proper redirect examination, not a proper basis for refreshment, and it constitutes an impeachment no matter what it is called.

The Court: Overruled.

Mr. Katz: Exception noted.

Mr. Tolin: Answer, please.

The Witness: Outside of what he told me about this hauling charge, he would charge me an extra hauling charge, and freight, and selection of the beef, he said, he would have to pay the packers a little more, that is, the packers were charging him more for the meat that he got for me.”

Re-Cross Examination

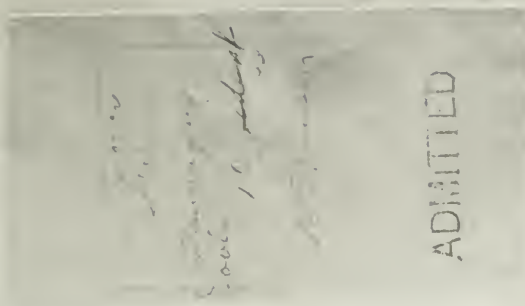
By Mr. Katz:

Mr. Flanagan told me that the packers were charging him more and that he consequently had to charge me more. I know that during this period of time prices were changing, they did go up and down.

HOWARD E. SMITH

called as a witness by and on behalf of the Government, being first duly sworn, was examined and testified as follows:

I was a butcher employed by Roland H. Richards in his market in Anaheim. On June 3, 1943, on that day Mr. Flannagan made a delivery of meat to Mr. Richard's market and delivered the beef to me. I recognize Government's Exhibit No. 9 as the invoice he gave me at that time. I received the meat that is listed on that invoice. I recognize Government's Exhibit No. 10, for identification, as a check Mr. Richards had signed in blank and left with me. I filled in the check, including the amount [20a] and delivered it to Mr. Flannagan at that time. He did not ask me for any other money or thing of value and I positively did not give him any. He did not discuss with me the subject of any other consideration. Government's Exhibit No. 10, for identification, was then offered in evidence by the Government and was received in evidence as Government's Exhibit No. 10.



WEST COAST MEAT CO.



90-369 ANAHEIM BRANCH 90-369

Bank of America

NATIONAL TRUST & SAVINGS ASSOCIATION

No.

ANAHEIM, CALIF.

6/3

1943

PAY TO THE ORDER OF

West coast meat Co

\$ 155.20

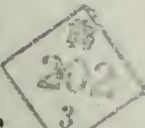
one hundred fifty five and 20/100

(20)

DOLLARS

Rec'd Filed

By P. H. Ruland



(Testimony of Howard E. Smith.)

Cross-Examination

By Mr. Katz:

I worked for Mr. Richards one year, one month and two days. He was out of the shop 65% or 70% of the time. He was in the meat market where his brother was, the grocery store at Newport Beach. When he was away I was in charge of the shop. I received the merchandise delivered to the shop. I recall the delivery of the shipment represented by the invoice which was marked Government's Exhibit No. 9. I accepted the delivery shown by that invoice. Mr. Richards was not present when I paid for that delivery. Mr. Flannagan did not ask for any sum of money or any consideration other than the check for that delivery. He did not at any time ask for any sum or consideration for the delivery he made on June 3; I did not pay him any sum or other consideration for the delivery.

LOUIS M. PICKEL

called as a witness by and on behalf of the Government, being first duly sworn, was examined and testified as follows:

I have engaged in the retail meat business in Anaheim a little over seven years. I was personally in charge of the business. I have known Mr. Flannagan since I acquired the market a little over seven years ago. He was one of my regular suppliers. He delivered meat in a yellow enclosed refrigerator

(Testimony of Louis M. Pickel.)

truck with green trimming. Sometime prior to the first of July, 1943, [21] I had a conversation with defendant Flannagan in my meat market in Anaheim, no one else was present. We talked about the prices to be charged me for beef and lamb item. I said that meat was getting hard to get and I knew that under the circumstances it would cost more and that subsequently I would have to pay more for it. He told me how much more but I don't remember how much he said. I told him I guessed that was the only way out and that it would have to be all right. That was the substance of the conversation.

I had another conversation with him after the one I related and before the first of July, 1943. Mr. Flannagan and myself were the only ones present. Mr. Flannagan said that as the prices changed he would have to pay more and I would have to pay more. He told me how much it would cost and how much he was allowed to charge. I don't remember what it was but it was something over the regular wholesale price which I understood was the ceiling, as freight or something of that kind. The first of July, 1943, was the first time I saw Government's Exhibit No. 7, for identification. It was in Mr. Flannagan's possession at that time. He brought it into my market. I received from Mr. Flannagan at that time the meats listed on that Exhibit. He got them from his truck and carried them into my place. After he carried them in he gave me Government's Exhibit No. 7, for identification,

(Testimony of Louis M. Pickel.)

and at the same time he gave me a piece of paper and told me that was how much I owed him. To my best recollection I did not owe him for any meat other than the meat described on Government's Exhibit No. 7, for identification. It was my practice to pay on delivery. There [22] were a couple of three times I didn't, but it was the general practice. The general practice was followed with respect to this transaction.

Government's Exhibit No. 8, for identification, is the slip that he gave me for collection that day. It was what he was collecting for the meat on Government's Exhibit No. 7, for identification. On Government's Exhibit No. 8, for identification, there were certain figures that are written in pencil and certain figures that are written in ink. I wrote the figures that are in ink and Mr. Flannagan wrote the figures that are in pencil. I wrote the words. He did not write any of the ink portion of Government's Exhibit No. 8, for identification. I wrote that portion. When he handed me Government's Exhibit No. 8, for identification, I paid him \$52.77 cash. \$52.77 was the only money I paid with respect to that transaction, to the best of my recollection. He did not deliver any other meat to me at that time. I checked the meat that was delivered to determine that it was as invoiced on Government's Exhibit No. 7, for identification, and it compared all right with the description on the invoice. As to item 2 of Government's Exhibit No. 7, for identification, I received 10 $\frac{1}{4}$ pounds of beef liver.

(Testimony of Louis M. Pickel.)

The 5 is the number of points per pound. As to item 3 on said Exhibit, I received one-half of a Grade A veal at 5½ points per pound. As to item 4 of said Exhibit, I received 7½ pounds of calf hearts at 5 points a pound. As to item 5 of said Exhibit, I received calf liver at 7 points per pound. As to item 6, I received brains at 2 points per pound and as to item 7, I received lamb at 5 points a pound. I received a 42 pound lamb, Grade A. I received Government's Exhibit No. 8, for [23] identification, from Mr. Flannagan when he brought it to me. He said, "That is how much you owe me today." I paid him \$52.77 at that time. He accepted the money, at the same time he wrote "Paid \$38.93" on Government's Exhibit No. 7, for identification. The Government then offered Government's Exhibits No. 7 and 8, for identification, as Government's Exhibits on the same numbers.

The defendant objected on the ground that there was no foundation for the receiving of Government's Exhibit No. 8, for identification, into evidence.

"Mr. Katz: I object to that, if the Court please. And if I may be heard on my objection, I would like to say this: Count 12 charges the defendant with the issuance of an invoice in connection with the sale of beef and lamb. Count 12 goes on to refer to the invoice stating the total price charged for the beef and lamb, and so forth. The invoice with reference to which the witness has been questioned, and which is now being offered, if the Court please,

(Testimony of Louis M. Pickel.)

is not an invoice that refers to beef and lamb at all. There is no reference to beef and lamb on there. It is not the invoice, or, at least, there is a fatal variance between the invoice referred to, being offered now, and the invoice referred to in Count 12. We object to its receipt, if the Court please, upon that ground; and upon the ground that there is no foundation laid.

“With respect to No. 8 for identification, if the Court please, there is no foundation whatsoever for the receipt of the document, and no evidence has been introduced to establish the necessary proper foundation.

The Court: Objection overruled as to Exhibit 7, for identification.

WEST COAST MEAT COMPANY

PHONE NEWPORT BEACH 1790

Newport Heights, Calif., 7-1 194 3

Sold to P. C. Heller No 7834

DESCRIPTION	WEIGHT	PRICE LB.	AMOUNT
1. 2 <u>Steak</u> 15	176	23 1/2	27 1/2
2. <u>Beef</u>	51	10 1/2	26 1/2
3. <u>CH</u> 15.5	391	7 1/2	23
4. <u>CH</u> 15	36	7 1/2	20
5. <u>CH</u> 7	11	1 1/2	5 1/2
6. <u>By</u> 2	4	2	10 1/2
7. <u>CH</u> 51	214	4 1/2	76
8.			
9.	885		
10.			38 93
11.			
12.			
13.			
14.			
15.			
TOTAL			

No. 16107 Ex.

662

VS.

Flannagan

Porti EXHIBIT

No. 7

Filed 11/2/43

RECORDED, CLERK

By W. Hansen

Dep. Clerk

ADMITTED

(Testimony of Louis M. Pickel.)

The other Exhibit, I think, is—As I understood your testimony, Mr. Pickel, it was that [24] the handwriting, the pencil handwriting, the figures on Exhibit 8, for identification, were placed there by the Defendant Flannagan; is that right?

The Witness: Yes, sir.

The Court: I don't think the jury should be permitted to see the pen and ink handwriting.

Mr. Tolin: The offer, your Honor, as I intended to make it, and as I now make it, is to offer in evidence only the pencilled portion, and for convenience here I suggest, rather than covering it, that it simply be read to the jury.

The Court: If you gentlemen can stipulate to the reading of those figures that are in pencil handwriting, the evidence that is receivable will be before the Court and jury, and that which is excludable will be excluded.

Mr. Katz: If the Court please, subject to the exception as to the ruling on Exhibits 7 and 8, without waiving such exception——

The Court: That's right.

Mr. Katz: ——I will stipulate it may be read, if your Honor is intending to admit that.

The Court: Yes. The Court is so intending and will do so.

Mr. Katz: All right, your Honor.

The Court: I understand you are agreeable, not waiving your objection, but insisting upon each of them——

Mr. Katz: Yes, your Honor.

(Testimony of Louis M. Pickel.)

The Court: —to have it read to the jury, what the pencilled handwriting on the document is?

Mr. Katz: Yes, your Honor; that is, the figures.

The Court: You may read that portion.

Mr. Tolin: Then I will read that portion and hand [25] the jury, for examination by the jurors, Exhibit 7?

The Court: Yes.

Mr. Tolin: I hand you Exhibit 7, and I will at this time read the admitted portion of Exhibit 8. '5 2 7 7.' "

Cross-Examination

By Mr. Katz:

I have been in the retail meat business in Southern California a little over twenty years. During the seven years I have been in business in Anaheim, Mr. Flannagan has supplied me with approximately every delivery. I require a particular grade of meat; to obtain that grade I arranged to have my meats specially selected for me. I used products within a certain weight range, items that were not too heavy for my particular trade. I required the merchandise to be in good condition from the standpoint of appearance and color. I was fussy about the kind of merchandise I handled in my store. Flannagan took care of all of these things for me over that seven year period.

STANLEY C. GORMAN

called as a witness by and on behalf of the Government, having been first duly sworn, was examined and testified as follows:

I am an investigator with the Office of Price Administration and was so employed in June and July of 1943. With an investigator named Klein, I went to defendant Flannagan's home at Newport Beach during the latter part of June or the first of July and had a conversation with him. No force or violence was used, nor any offer of immunity or reward was held out. There were two or three, or perhaps four other people there. There was a young boy and two or three ladies.

"Q. Tell us the conversation you had with the Defendant Flannagan at that time on that subject.

[26]

Mr. Katz: Objected to, if the Court please; no foundation laid; incompetent, irrelevant and immaterial, and no corpus delicti has yet been established.

The Court: Overruled. * * *

Q. By Mr. Tolin: Tell us what was said by all of the parties who participated in the conversation, giving us the substance of it."

The conversation in substance was that Mr. Klein asked the defendant if he was Mr. Flannagan and the defendant stated that he was and that he was doing business under the title "West Coast Meat Company"; that he was the company, that he had no place to store meat on the premises. He was

(Testimony of Stanley C. Gorman.)

asked from whom he purchased meats and he named several packers and stated that he was not required to pay any price to the packers over and above ceiling prices. He was asked to produce his checks and did so. He stated that he operated from a green truck. Defendant Flannagan asked the witness and Klein why the investigator had browbeaten Kilduff into giving a false statement.

At the conclusion of this testimony, Defendant made a motion to strike the entire evidence upon the ground that the same was incompetent, irrelevant and immaterial, and not related to any charges contained in the Information, which motion was denied and exception noted.

Cross Examination

By Mr. Katz:

It is true that I stated to Flannagan, at Flannagan's home; that he wanted some information from him, that we were interested in the peddlers' rights; that if any squeeze had been put on Flannagan by the packers we were interested in protecting Flannagan's [27] rights, but that our primary purposes was to get a list of Flannagan's customers. Flannagan gave us such a list. Flannagan stated in reply to a question that he had not made any purchase in excess of ceiling prices.

At the conclusion of the Government's case, the Defendant made a motion for a directed verdict of acquittal as to the remaining Counts VIII, X, XI and XII, and each of them, upon the ground that the evidence was insufficient to sustain a conviction,

(Testimony of Stanley C. Gorman.)

which said motion as to each of said Counts was denied and exceptions taken.

CLARENCE O. FLANNAGAN

called as a witness by and in his own behalf, having been first duly sworn, was examined and testified as follows:

I am Clarence O. Flannagan who is the defendant in this case. I have lived in Southern California for a period of twenty years. I am now a driver-salesman for the West Coast Meat Company and have been since 1939. I have known Kilduff for two or three years but have not transacted any business with him before June 24, 1943. On that date I visited Kilduff at Kilduff's place of business. Kilduff had been for some *item* trying to get me to come down to Kilduff's Market. Kilduff had called me at my house a time or two and I had had mutual friends contact me and ask me to come down to serve him. When I met Mr. Kilduff, Kilduff told me that he lost his source of supply, particularly of beef and wanted to know if I could supply him with some. I told him that I could not, that I was not getting enough meat to take care of my regular customers. On the 24th of June, 1943, I delivered to Kilduff the items shown on the statement of June 24, which I recognize as Government's Exhibit No. 1. I did discuss with Kilduff the matter of prices [28] to the effect that my price

(Testimony of Clarence O. Flannagan.)

was higher than the packers and that he, Kilduff, could do better if he bought from the packers. I told Kilduff the price I was entitled to charge under the Office of Price Administration ceiling regulation and that this price would be more than he would have to pay to the packers. Kilduff paid me by check for the items reflected in the invoice, Government's Exhibit No. 1. I did not receive any consideration or thing of value except that check from Kilduff. I did not at any time charge, demand, collect or receive any cash or any consideration or thing of value except the check for the items shown in the invoice, Government's Exhibit No. 1. All charges were reflected in the invoice, including delivery charges. On June 24, 1943, before I took the meat into Kilduff's Market, I discussed with Kilduff a matter relating to 7c per pound for meat. In that discussion I stated to Kilduff that if he went to the packing house district quite often he would be able to find a "B" grade of beef, that would suit his purpose just as well as an "A" grade and the difference between the cost of "A" and "B" grades of beef together with the difference in the amount of money that I could charge him for the beef over and above what the packers would charge would amount to as much as 6c or 7c. I do not recall any other mention of 7c. Before I left on the 24th of June, 1943, Kilduff asked me if I could bring him some more beef the next day. On the next day, June 25, I delivered a meat order to Kilduff consisting of the items reflected in the

(Testimony of Clarence O. Flannagan.)

invoice dated June 25, 1943, Government's Exhibit No. 2. Kilduff paid the amount of the invoice by check and I identify [29] Government's Exhibit No. 3 as the check I received. I did not receive any cash or other consideration excepting that check in payment for the items delivered on June 25, 1943. Kilduff stated he wanted more meat the following delivery if I could get it and I told him I would bring it if I could get it. On June 28, 1943, I delivered to Kilduff the items shown and reflected by the invoice dated June 28, 1943, Government's Exhibit No. 4. I recognize Government's Exhibit No. 5 as a check I received from Kilduff at the time I made that delivery. It was in payment of the items on the invoice. I did not at the time of delivery receive any cash or other consideration or thing of value except said check for the delivery made on June 28, 1943, nor did I at that time or any other time receive any other consideration or thing of value for the items reflected on said invoice and delivered to Kilduff. Nor did I charge, collect or receive any cash or other consideration, or thing of value except said check, Government's Exhibit No. 5, for the items delivered on June 28, 1943.

Government's Exhibit No. 4 reflects the total charges that I made for the items delivered on that date and there were no charges paid that were not included in the price set forth on the invoice. In the latter part of June or the first part of July,

(Testimony of Clarence O. Flannagan.)

1943, I received a visit in my home at Newport Beach from two Office of Price Administration investigators whom I did not know at the time, but later learned were Mr. Klein and a Mr. Gorman. I had a conversation with said investigators at that time wherein they told me that they had information that the West Coast Meat Company had violated Office of Price Administration [30] ceiling regulations. I told them that they were mistaken; that there had been no violation on the part of myself or the West Coast Meat Company. The investigators told me it did not matter a great deal, that they were not interested in prosecuting me, that their interest was in trying to get incriminating evidence of some sort against the big packers, that I would be in a position to give them that information or assist, and if I did so there would be no charges placed against me or the West Coast Meat Company. I told them that I had no such information and was in no position to help them get evidence. They told me that if I felt that way about it they would place charges against me and the West Coast Meat Company. They required me to produce my books, which I did, for their inspection. I did not tell either investigator that I was the West Coast Meat Company. Neither of them asked me if I had a fixed place of business or facilities for storing meat, nor did they ask me if there were any partners in the West Coast Meat Company, nor did they ask me if I was the owner of the West Coast Meat Company. I did not tell

(Testimony of Clarence O. Flannagan.)

them that I was the sole owner of the West Coast Meat Company, but said that I was a driver-salesman for said company, and that the sole owner of the West Coast Meat Company was my wife, Laura Flannagan, and that she is a sole trader. I know Mr. Pickel who testified here. I have known him a long time, it must be ten years. Anyway I have transacted business with him continuously since he started business. I transacted business with him practically every trip, every delivery I made. He had a high-grade market and was very particular about the quality of his meat. I selected for him the kind [31] and quality of meat that he used in that market. He used meat and meat products falling within particular weight range and was very particular about that. I selected for him meats of the quality and within the weight range he required for his trade and business. I had a number of conversations with him between the first of the year and July 1st. I recall a conversation with Mr. Pickel in which I told him that his meat was going to cost him more. I don't recall any particular date. That was about the time the Office of Price Administration regulation began *effecting* people and his business and the business I was engaged in. I told Mr. Pickel at that time that our manner of doing business was changing due to the restrictions placed on it by the Office of Price Administration regulations; that we were allowed, that is to say, we had to govern ourselves by a ceiling price

(Testimony of Clarence O. Flannagan.)

established by the Office of Price Administration. Those ceiling prices were different according to the type of business we were in. In our particular case I would be allowed to add certain additions for freight and handling and service, etc., and that his merchandise would cost him more money in the future from me than it would if he could get it from the packers. The price of the packers ceiling and maximum price was less than the price of the West Coast Meat Company. The West Coast Meat Company obtained its meats from the various packers in Vernon. From time to time I talked to Mr. Pickel about different rules and regulations and supplements and supplementary rules put out by the Office of Price Administration and I explained to him what they were.

“Q. Did you at any time in any of the conversations that you had with Mr. Pickel say anything to Mr. Pickel [32] about his paying anything over ceiling?

A. Well, yes; not exactly in those words, however.

Q. What was said about that matter?

A. I tried—I am getting started wrong again.

Q. What did you say?

A. I said to Mr. Pickel at all times that the prices he was paying me for meat was more than the packer's price; that I was entitled and allowed by the regulations of the O. P. A. to charge him more.”

I did not tell Mr. Pickel that I was charging

(Testimony of Clarence O. Flannagan.)

more than the ceiling price of the West Coast Meat Company.

I recognize Government's Exhibit No. 7 as an invoice of the West Coast Meat Company. I delivered the items shown on that invoice to Mr. Pickel. He paid me at the time of delivery in cash. He did not pay me any sum of money in excess of the amount shown on that invoice, Government's Exhibit No. 7, \$38.93. He did not at that time or any other time pay any other consideration or thing of value for the items delivered by me to him on July 1, 1943. With respect to Government's Exhibit No. 8, I state that I have never seen it before. As to the figures 5 2 7 7 on that Exhibit, I state that I don't believe that is my handwriting; it don't look like my handwriting. I have no recollection of it. I do not recall ever having delivered this slip to Mr. Pickel. I haven't the faintest idea what the figures 5 2 7 7 refer to. I have not been involved in any kind of criminal proceedings prior to this, nor have I been in any trouble with any Government agency or authorities prior to this difficulty. I did not at any time to my knowledge sell any meat or meat product in excess of the maximum prices nor did I at any time intend to violate the Maximum Price Regulations. [33]

Cross Examination

By Mr. Tolin:

The first transaction I ever had with Mr. Kilduff was on the 24th of June, 1943. At that time Kilduff told me he was desperate to get meat. At that

(Testimony of Clarence O. Flannagan.)

time I was making purchases regularly from the packers in the Vernon district from Rosen Brothers, Klubniken Packing Company, Clougherty Brothers, Sterling Packing Corporation, Quality Meat Packing Company, and others.

I have been engaged in the meat business for approximately twenty years, during which time I had contact with packers in the Vernon district. At the time I saw Kilduff I told Kilduff I was having trouble getting enough meat to supply my own customers. That was true; I had tried to obtain greater supplies of meat than I was obtaining. I made efforts from every packer in the Vernon district that I dealt with. At that particular time the biggest trouble was the quota they were operating under. In order to get anywhere near the distribution of meat they had to limit the amount they gave any individual or any one concern. No one got near as much as they wanted. I did not go to packers that I hadn't been dealing with regularly and try to increase my stock by trying to purchase from them. That would have been useless. If you could not get enough from the packers you had been buying from they certainly would not take on a new one. At that time I said to Mr. Kilduff that he could probably purchase on better terms from the packers in the Vernon district than he could from me. I recognize Government's Exhibit No. 1 as the first invoice I gave Mr. Kilduff. I wrote out that invoice; I figured the [34] prices that appear on it. I figured the additions that were allowed by a per-

(Testimony of Clarence O. Flannagan.)

son doing business as the West Coast Meat Company and include those additions in those prices. Those additions include a charge for making delivery in that area. I figured the differentials which were allowed, those of the zone and those of the delivery charge and added them to the base price, that and any other additions that we were allowed to make. To the best of my knowledge the prices on Government's Exhibit No. 1 were the ceiling price the West Coast Meat Company was allowed to charge for that day. It is true that the other invoices that have been shown here this morning are the ceiling price, including the extra because of the zone and the delivery charge. There was no other charge that I made any of these men, Kilduff, Pickel or Richards, because of any other service than that which is included in the prices set forth on these several invoices. It was approximately ten years ago when I first started transacting business with Mr. Pickel. I was operating as an independent meat distributor. The business was conducted off the truck. The place of business was the truck. There was a period in 1937 or 1938 that I discontinued business as an individual. C. O. Flannagan was out of business for a few months. I have always considered my home really my place of business, that is where I operate from, that is where my phone is and where I start and finish. The merchandise was always handled off the truck. I had no storage facilities there at home. I reside at 325 Santa Ana [35] Avenue, Newport Beach,

(Testimony of Clarence O. Flannagan.)

with my wife, Laura Flannagan. When Mr. Klein and Mr. Gorman called on me at my home I don't recall that there was any conversation about the West Coast Meat Company. I did not tell them who owned the West Coast Meat Company. I have been employed by the West Coast Meat Company since 1939 when it was set up by Laura Flannagan. Laura Flannagan was the manager of the West Coast Meat Company during June and July, 1943. I made the purchases from the packers; I made the sales to the customers. I did not ever have a stock of meat other than that which was carried on the truck. I am acquainted with the custom of retail meat dealers in purchasing their supply of meat. Generally the price paid to a concern that delivers meat to the retail store and does business from the truck in the way that the West Coast Meat Company did is a higher price than that charged by a packer for delivery of meat at the packer's place of business.

The witness was asked the following question and objection was made and colloquy had as follows:

“Q. During June and July of 1943 did you pay packers or any packer a price above the ceiling price?”

Mr. Katz: Objected to, if the Court please. It is incompetent and irrelevant, has no issue in this case, and the only purpose of that question can be an attempt to prejudice the defendant. It would be a matter of going into crimes and transactions

(Testimony of Clarence O. Flannagan.)

that are not part of this case at all, if the Court please.

Mr. Tolin: May I explain? One of the witnesses testified here yesterday that that was the reason [36] why Mr. Flannagan was obliged to charge him higher prices. At least, that was the reason Mr. Flannagan had related to him as one of the reasons why he would have to charge him higher prices.

Mr. Katz: If the Court please, I regret to say that I don't believe that the statement that Mr. Tolin made is an accurate reflection of the record. I believe he is referring to the statement made by a witness that referred to the conversation that Mr. Flannagan told the witness, Mr. Pickel, I believe it was, that 'I have to pay higher prices' because he was paying higher prices to the packer. But that did not go to any question at all, if the court please, of prices in excess of ceiling or in excess of lawful prices as to packers' prices.

Mr. Tolin: I was referring to the testimony of Mr. Richards.

The Court: Objection overruled.

The Witness: I have lost the question.

The Court: Read it.

(The question was read.)

Mr. Katz: May we note an exception, please?

The Witness: No sir, I did not."

In none of my transactions in which I delivered meat to Mr. Kilduff, which transactions are represented by the invoices, did I deliver to Kilduff, or

(Testimony of Clarence O. Flannagan.)

anyone in his employ, any other memorandum or writing concerning the transaction.

Re-Direct Examination

All sales made since 1939 by me were made for and on behalf of the West Coast Meat Company. I recall testifying upon cross examination that one of the [37] additions included in the prices charged was a delivery charge, that another of the additions was a charge because of the fact that the sales were made in Zone 1 and some of the basic prices are based upon Zone 4; that additional charges are permitted a wholesaler; that there is an addition permitted to be charged in connection with a peddler-seller; that I made additions so that regardless of whether I was classified as a wholesaler, peddler, or independent wholesaler, I would be within the maximum ceiling price.

The Government Rests.

The Defense Rests.

That on the 10th day of November, 1943, the Government and the Defendant having rested their respective cases, the Defendant Flannagan made a motion for a directed verdict as to the remaining counts, namely, Counts VIII, X, XI and XII, upon the ground that the evidence introduced by the Government was insufficient to sustain the charges contained in said Counts VIII, X, XI and XII, and each of them, which said motion was by the trial court denied, and Defendant duly excepted thereto.

That after both sides had announced they rested

their respective cases, the court called counsel into Chambers for the purpose of discussing the question of instructions to be given to the Jury. The proposed instructions filed by the Government and the proposed instructions filed by the Defendant, and each of them, were individually reviewed by the court and counsel, and the legal propositions and questions contained and raised in each individual instruction was thoroughly discussed.

Counsel for the Defendant specifically objected to the trial court charging the Jury, as requested by the Government in its proposed Instructions Nos. 1, 3, 5, 6, 8, 10, 11, 12 and 13.

Counsel for the Defendant, as the basis for his objection, pointed out to the Court that it was the duty of the trial [38] court, in its charge to the Jury, to read to the Jury Maximum Price Regulation No. 169, issued by the Price Administrator of the Office of Price Administration, which governs beef and veal carcasses and wholesale cuts, Counsel for the Defendant contending that it was the exclusive province of the Jury to apply the evidence to the law, as contained in the Regulation, and determine therefrom whether or not the law announced in said regulation had been violated; that incidentally, it was within the province of the Jury to determine the maximum price for a particular type of meat on a particular day in question, and that the Court would, if it charged the Jury as requested by the Government, be usurping the functions of the Jury relative to matters of fact.

The trial court overruled these objections of the Defendant.

Counsel for the Defendant further objected to the giving of the Government's proposed Instruction No. 14, on the ground that the specific intent referred to in the Instruction as required, could not be solely based upon a willful sale at excessive price. and that further, the Instruction endorsed the proposition that the court could charge the Jury specifically as to what the price of meat was on the day in question.

The trial court overruled this objection of the Defendant.

In Chambers, Counsel for Defendant then urged the Court to give his, the Defendant's, Instructions Nos. 2, 5, 6, 8, 15, 16, 17, 22, 23, 24, 25, 32, 35, 36 and 39.

Defendant's requested Instruction No. 23 contained a recitation of Maximum Price Regulation No. 169. Defendant's counsel urged the charging of the Jury in accordance with this Regulation in conformity with his contentions as heretofore set out.

The Court refused to give these numbered instructions, as specifically proposed and requested by Defendant. [39]

The discussion terminated, and the Court took the bench and charged the Jury as follows:

"The Court: Gentlemen of the Jury, the Court instructs you as follows:

The counts of the information, the amended information, with which we are concerned in this case,

gentlemen, are Counts 8, 10, 11 and 12. Those are the only counts in connection with which you are to conduct your deliberations, and they are the only counts as to which the evidence in the case has been directed. I shall read, substantially, each of those counts so that you will have them in mind as the instructions proceed.

Count 8 alleges, substantially, that on or about the 3rd day of June, 1943, the defendant did knowingly, wilfully and unlawfully offer for sale, sell and deliver to H. R. Richards, doing business as Rich's Market, Anaheim, California, one beef carcass, U. S. Grade A, weighing 640 pounds, for the sum of \$225.83; that the maximum price permitted under said Revised Maximum Price Regulation 169, as amended, for said beef carcass, U. S. Grade A, weighing 640 pounds was \$155.20.

Count 10 substantially alleges that on or about the 25th day of June, 1943, the defendant did knowingly, wilfully and unlawfully offer for sale, sell and deliver to James R. Kilduff, doing business as Kilduff's Market, Anaheim, California, one side of Beef, U. S. Grade A, weighing 564 pounds for the price of 29 $\frac{1}{4}$ c per pound, that the maximum price permitted under said Revised Maximum Price Regulation 169, as amended, for said side of beef, U. S. Grade A, weighing 564 pounds, was 22 $\frac{1}{2}$ c per pound.

Count 11 substantially alleges that on or about the [40] 28th day of June, 1943, the defendant did knowingly, wilfully and unlawfully offer for sale,

sell and deliver to James R. Kilduff, doing business as Kilduff's Market, Anaheim, California, one U. S. Grade B beef carcass, weighing 425 pounds for the price of $27\frac{1}{4}c$ per pound, that the maximum price permitted under said Revised Maximum Price Regulation 169, as amended, for said U. S. Grade B beef carcass, weighing 425 pounds, was $20\frac{1}{4}c$ per pound.

And the last count of the amended information, to-wit, Count 12, substantially alleges that on or about the 1st day of July, 1943 the defendant Clarence O. Flannagan sold and delivered to L. M. Pickel, doing business as Pickel's, Anaheim, California, certain beef and lamb cuts; that in connection with and as a part of said sale the defendant did knowingly, wilfully and unlawfully and with intent to evade the maximum prices permitted for said cuts, as established by Revised Maximum Price Regulation 169, as amended, and Revised Maximum Price Regulation 239, as amended, issued pursuant to the Emergency Price Control Act of 1942, furnish to L. M. Pickel, doing business as Pickel's, an invoice stating the total price charged for said beef and lamb cut to be \$38.93, where as in truth and in fact, the defendant then and there well knew, the total price charged and received by the defendant from L. M. Pickel, doing business as Pickel's, for said beef and lamb cuts, was \$52.77, which total price of \$52.77 was in excess of the maximum price permitted for said cuts by said Revised Maximum Price Regulation No. 169, as amended, and Revised Maximum Price Regulation 239, as amended.

Those constitute the charges, gentlemen, and each charge must be considered separately and distinct from the others. [41]

By the filing of the information or accusation no presumption whatsoever arises to indicate that a defendant is guilty, or that he has had any connection with, or responsibility for, the acts charged against him. A defendant is presumed to be innocent at all stages of the proceeding until the evidence introduced shows him to be guilty beyond a reasonable doubt. And this rule applies to every material element of the offenses charged. Mere suspicion will not authorize a conviction. A reasonable doubt is such a doubt as you may have in your minds when, after fairly and impartially considering all of the evidence, you do not feel satisfied to a moral certainty of the defendant's guilt. In order that the evidence submitted shall afford proof beyond a reasonable doubt, it must be such as you would be willing to act upon in the most important and vital matters relating to your own affairs.

Reasonable doubt is not a mere possible or imaginary doubt or a bare conjecture; for it is difficult to prove a thing to an absolute certainty.

You are to consider the strong probabilities of the case. A conviction is justified only when such probabilities exclude all reasonable doubt as the same has been defined to you. Without it being restated or repeated, you are to understand that the requirement that a defendant's guilt be shown beyond a reasonable doubt is to be considered in

connection with and as accompanying all the instructions that are given to you.

In judging of the evidence, you are to give it a reasonable and fair construction, and you are not authorized, because of any feeling of sympathy or other bias, to apply a strained construction, one that is unreasonable, in order to justify a certain verdict when, were it not for such feeling or bias, you would reach a contrary conclusion. And, whenever, after a careful consideration of all of the evidence, your minds are in that state where a conclusion of innocence is indicated equally with a conclusion of guilt, or there is a reasonable doubt as to whether the evidence is so balanced, the conclusion of innocence must be adopted.

You are the sole judges of the credibility and the weight which is to be given to the different witnesses who have testified upon this trial. A witness is presumed to speak the truth. This presumption, however, may be repelled by the manner in which he testifies; by the character of his testimony, or by evidence affecting his character for truth, honesty and integrity or his motives; or by contradictory evidence. In judging the credibility of the witnesses in this case, you may believe the whole or any part of the evidence of any witness, or may disbelieve the whole or any part of it, as may be dictated by your judgment as reasonable men. You should carefully scrutinize the testimony given, and in so doing consider all of the circumstances under which any witness has testified, his demeanor, his

manner while on the stand, his intelligence, the relations which he bears to the Govern- [42] ment or the defendant, the manner in which he might be affected by the verdict and the extent to which he is contradicted or corroborated by other evidence, if at all, and every matter that tends reasonably to shed light upon his credibility. If a witness is shown knowingly to have testified falsely on the trial touching any material matter, the jury should distrust his testimony in other particulars, and in that case you are at liberty to reject the whole of the witness' testimony.

The defendant has offered himself as a witness and has testified in the case. Having done so, you are to estimate and determine his credibility in the same way as you would consider the testimony of any other witness. It is proper to consider all of the matters that have been suggested to you in that connection, including the interest that the defendant may have in the case, his hopes and his fears, and what he has to gain or lose as a result of your verdict. [43]

The interest of a defendant in the result of the action does not deprive him of the benefit of his own testimony. The law makes him a competent witness in his own behalf, and his testimony is entitled to full and fair consideration by you, the same as that of any other witness, and is sufficient in itself, if it raises in your minds a reasonable doubt as to whether the crime or crimes charged was committed by this defendant to entitle the defendant to an acquittal at your hands.

You are not limited in your consideration of the evidence to the bald expressions of the witnesses; you are authorized to draw such inferences from the facts and circumstances which you find have been proved as seem justified in the light of your experience as reasonable men.

There is nothing peculiarly different in the way a jury is to consider the proof in a criminal case from that by which men give their attention to any question depending upon evidence presented to them. You are expected to use your good sense, consider the evidence for the purposes only for which it has been admitted, and in the light of your knowledge of the natural tendencies and propensities of human beings, resolve the facts according to deliberate and cautious judgment; and while remembering that the defendant is entitled to any reasonable doubt that may remain in your minds, remember as well that if no such doubt remains the Government is entitled to a verdict. Jurors are expected to agree upon a verdict where they can conscientiously do so; you are expected to consult with one another in the jury room with the view of reaching agreement without violence to individual judgment of each juror and any juror should not hesitate to abandon his own view when convinced that it is erroneous. In determining what your verdict shall be you are to consider only the evidence before you. Any testimony as to which an objection was sustained, and any testimony which was ordered stricken out, must be wholly left out of

account and disregarded. The opinion of the judge as to the guilt or innocence of a defendant, if directly or inferentially expressed in these instructions, or at any time during the trial, is not binding upon the jury. For to the jury exclusively belongs the duty of determining the facts. The law you must accept from the court as correctly declared in these instructions.

End of Instruction [44]

PLAINTIFF'S INSTRUCTION No. 12

The defendant is here prosecuted for alleged violations of the Emergency Price Control Act of 1942. This law was adopted by the Congress of the United States pursuant to authority given to the Congress of the United States by the Constitution. You are not concerned with its wisdom or unwisdom. It is the law of the land and you must be governed by it in the determination of this case. This law the Congress had the right to pass and it does not violate any of the constitutional rights of any person. The maximum prices at which various meats can be lawfully sold to retail dealers as I shall give them to you have been lawfully fixed under the Emergency Price Control Act of 1942 to which I have just referred, and such lawfully fixed

maximum prices are binding upon you and must be so considered in your deliberations.

Instruction No. 12

Given as Requested:

Given as Modified: √

Refused:

McCORMICK

United States District Judge

[45]

PLAINTIFF'S INSTRUCTION No. ..

It is not necessary for you to determine whom the owner of West Coast Meat Company was at the time of the alleged offenses for the ownership of that Company is not an issue in this case.

Instruction No. √

Given as Requested: √

Given as Modified:

Refused:

McCORMICK

United States District Judge

[46]

Some of the testimony in this case is that of accomplices, and, as there are certain rules of law applicable to such testimony, it is proper for the court to instruct you in reference to them.

An accomplice is one who knowingly and voluntarily, and with common intent with another person, unites with such person in the commission of an offense.

On this subject the court further instructs you, that the law is that accomplices are competent wit-

nesses. That means that the parties have a right to have them sworn. It also implies that, when sworn, you shall consider their testimony, and it is not necessary that the testimony of an accomplice be corroborated in order to justify the jury to convict upon such testimony. Such testimony, however, is always to be received with caution, and weighed and scrutinized with great care by the jury, and the jury should not rely upon it unsupported, unless it produces in their minds full conviction of its truth, and if and when it does so effectuate the mind of jurors it should be accepted. The value, weight and effect of the testimony of accomplices in this case is solely a matter for the jurors' determination.

McCORMICK

J [47]

Evidence of defendant's general reputation for traits or qualities involved in the offences charged in the four counts of the amended information should be considered by you in connection with all of the other evidence in the case, and such evidence may of itself, if believed by you, create a reasonable doubt where otherwise no reasonable doubt would exist in your mind. The weight, value and effect which you may give to character evidence which has been introduced in this case is exclusively for your determination and should be considered in connection with all of the other evidence in the case and if you believe from all the evidence beyond all reasonable doubt that defendant is guilty of the

crime or crimes charged in the applicable counts of the amended information you should so find notwithstanding character evidence.

McCORMICK

J [48]

PLAINTIFF'S INSTRUCTION No. 16

With respect to the maximum prices I have referred to in these instructions you are instructed that the Maximum Price Regulation relating to veal and beef in effect at all pertinent times provided as follows:

“The price limitations set forth in this Revised Regulation shall not be evaded, either by direct or indirect methods, in connection with an offer * * * sale, delivery * * * relating to beef (or) veal * * * or in conjunction with any other commodity or services, or by way of any commission, service, transportation, wrapping, packaging or other charge * * * or by tying agreement or other trade understanding.”

Instruction No.

Given as Requested: √

Given as Modified:

Refused:

McCORMICK

United States District Judge

[49]

PLAINTIFF'S INSTRUCTION No. 13

The Emergency Price Control Act of 1942, provides that any person who wilfully violates certain provisions of the Act shall be guilty of an offense.

Among the provisions of the Act to which this provision applies is the following:

"It shall be unlawful, regardless of any contract, agreement, * * * or other obligation heretofore or hereafter entered into, for any person to sell or deliver any commodity, * * * or otherwise do or omit to do any act, in violation of any regulation or order * * * of any price schedule effective in accordance with the provisions of" this Act.

The prices which I shall read to you as the highest lawful prices in effect on certain days for the several meat items to which I shall *referred* were fixed in accordance with the Emergency Price Control Act of 1942 from which I have just read and those prices, and each and every one of such prices was accordingly fixed by law.

Instruction No. 13

Given as Requested: ✓

Given as Modified:

Refused:

McCORMICK

United States District Judge

[50]

PLAINTIFF'S INSTRUCTION No. 15

The following regulation was in effect at all times pertinent to this case:

“Every person making a sale of any beef carcass, beef wholesale cut, veal carcass, veal wholesale cut, * * * subject to this revised regulation shall furnish to the purchaser at the time of delivery a written statement setting forth the name and address of the buyer and seller; identifying each such item sold; and setting forth the quantity, the grade, including sex identification as to cow, stag, and bull, and the weight thereof, and the price charged and received therefor, including a separate statement of the transportation and local delivery charge * * *”

Instruction No.

Given as Requested: ✓

Given as Modified:

Refused:

McCORMICK

United States District Judge

[51]

PLAINTIFF'S INSTRUCTION No. 1

I am *about* *instruct* you as to what the highest legal prices that could be charged retail meat dealers for beef were on the dates pertinent to the several counts of the Information in this case.

Before giving you such maximum prices, I instruct you that the prices I will read to you are deemed to include the highest legal price for the meat and service charge. On the dates with which you are concerned, it was not lawful for a seller of

meat to a retail meat dealer, to add any charge or bonus, or side money in any amount whatsoever, to the prices I am about to quote to you.

Instruction No. 1

Given as Requested: √

Given as Modified:

Refused:

McCORMICK

United States District Judge.

[52]

PLAINTIFF'S INSTRUCTION No. 2

The date alleged in Count VIII of the Information as the time defendant allegedly committed the offense therein charged is June 3, 1943.

Instruction No. 2

Given as Requested: √

Given as Modified:

Refused:

McCORMICK

United States District Judge

[53]

PLAINTIFF'S INSTRUCTION No. 3

On the third of June, 1943, the highest price at which it was lawful to offer for sale or to sell and deliver a U. S. Grade A beef carcass to a retail dealer was twenty-four and one quarter cents per pound.

Instruction No. 3

Given as Requested: ✓

Given as Modified:

Refused:

McCORMICK

United States District Judge.

[54]

DEFENDANT'S REQUESTED INSTRUCTION

No. 34

One of the essential elements of the offenses set forth in Counts 10, 11 and 12 of the information is that the defendant sold beef, and lamb at prices in excess of the maximum prices permitted by Maximum Price Regulations issued by the administration of the Office of Price Administration and in force and effect at the respective times specified in the counts of the Amended Information under consideration. If you are unable to determine from the evidence whether or not defendant sold beef, and lamb at prices in excess of maximum prices permitted therefor, or if there is a reasonable doubt in your mind from all the evidence as to whether any sales defendant may have made were or were not made at prices in excess of maximum prices permitted therefor as alleged in said counts respectively you must find the defendant not guilty.

Given.

McCORMICK

J [55]

PLAINTIFF'S INSTRUCTION No. 4

The date alleged in Count X of the Information as the time defendant allegedly committed the offense therein charged is June 25, 1943.

Instruction No. 4

Given as Requested: ✓

Given as Modified:

Refused:

McCORMICK

United States District Judge.

[56]

PLAINTIFF'S INSTRUCTION No. 5

On the 25th day of June, 1943, the highest price at which it was lawful to offer for sale or to sell and deliver U. S. Grade A beef to a retail dealer was twenty-two and one quarter cents per pound.

Instruction No. 5

Given as Requested: ✓

Given as Modified:

Refused:

McCORMICK

United States District Judge.

[57]

PLAINTIFF'S INSTRUCTION No. 11

On the 25th day of June, 1943, the highest price at which it was lawful to offer for sale or to sell and deliver the following mentioned varieties of meat to a retail dealer were as follows: Oxtail, fourteen and three quarter cents per pound; Brain, ten and

three quarter cents per pound; Heart, eighteen and three quarter cents per pound; Liver, twenty-six and three quarter cents per pound; Tongue, twenty-five and three quarter cents per pound.

Instruction No. 11

Given as Requested: √

Given as Modified:

Refused:

McCORMICK

United States District Judge
[58]

PLAINTIFF'S INSTRUCTION No. 7

The date alleged in Count XI of the Information as the time defendant allegedly committed the offense therein charged is June 28, 1943.

Instruction No. 7

Given as Requested: √

Given as Modified:

Refused:

McCORMICK

United States District Judge
[59]

PLAINTIFF'S INSTRUCTION No. 8

On the 28th day of June, 1943, the highest price at which it was lawful to offer for sale or to sell and deliver a U. S. Grade B beef carcass to a retail dealer was twenty and one quarter cents per pound.

Instruction No. 8

Given as Requested: ✓

Given as Modified:

Refused:

McCORMICK

United States District Judge

[60]

PLAINTIFF'S INSTRUCTION No. 6

I have [illegible] you of a price of twenty-four and one quarter cents a pound as the legal maximum price for a U. S. Grade A beef carcass on June 3, 1943; and a legal maximum price for the same quality beef on June 25, 1943, as twenty-two and one quarter cents per pound.

In order that you will not be confused by the fact that these prices vary, I explain to you that one set of prices was lawful between April 14, 1943 and June 19, 1943. On this latter date, a new price list went into effect. The date alleged with respect to Count VIII is within the period of time covered by one maximum price.

All other pertinent counts of the Information allege dates within the time period covered by the superseding price list.

Instruction No. 6

Given as Requested:

Given as Modified: ✓

Refused:

McCORMICK

United States District Judge

[61]

PLAINTIFF'S INSTRUCTION No. 9

The date alleged in Count XII of the information as the time defendant allegedly committed the offense therein charged is July 1, 1943.

Instruction No. 9

Given as Requested: ✓

Given as Modified:

Refused:

McCORMICK

United States District Judge

[62]

PLAINTIFF'S INSTRUCTION No. 10

On the 1st day of July, 1943, the highest price at which it was lawful to offer for sale or to sell and deliver one half of a Grade A veal carcass to a retail dealer was twenty-three cents per pound.

On the same date, the highest price at which it was lawful to offer for sale or to sell and deliver a Grade A lamb carcass to a retail dealer was twenty-six cents per pound.

Instruction No. 10

Given as Requested: ✓

Given as Modified:

Refused:

McCORMICK

United States District Judge

[63]

DEFENDANT'S PROPOSED INSTRUCTION
No. 13

It is neither criminal nor unlawful for a person to do, or to agree to do, that which the law does not prohibit but recognizes may be lawfully done. So if you believe from the evidence in this case, or if you entertain a reasonable doubt from all the evidence that whatever act or acts was or were done by the defendant was or were done, not with any criminal intent or not for the purpose of doing or performing any unlawful act, but, on the other hand, was or were done honestly and with an honest intent and purpose and in the belief that such act or acts was or were proper and lawful, then and in such event no crime has been committed, and if you so conclude under all of the evidence it will be your duty to find the defendant not guilty.

Given as modified.

McCORMICK

J [64]

PLAINTIFF'S INSTRUCTION No. 14

This is an offense requiring a specific intent, and such intent must be shown to exist beyond a reasonable doubt. The intent on the part of the defendant may be shown by his acts and declarations and by the circumstances surrounding his actions which, when taken together, must prove beyond a reason-

able doubt that the defendant had the specific intent to wilfully sell and deliver meat at a price or prices in excess of the lawful price or prices.

If you are convinced beyond a reasonable doubt that the defendant did in fact sell meat to anyone, or more of the persons named in the several counts of the Information, and that he did in fact charge a price or prices for such meat in excess of the prices I have read to you, and that he at such time or times intended to so sell such meat at a higher price or prices than permitted by the Maximum Price Regulations promulgated under the Emergency Price Control Act of 1942, then you will find that he did so with a specific intent.

Instruction No. 14

Given as Requested: ✓

Given as Modified:

Refused

McCORMICK

United States District Judge

[65]

If you find from the evidence that the defendant did not violate any of the provisions of revised maximum price regulations as alleged in the respective counts of the amended information, or if after considering all of the evidence in the case and the law as stated in the instructions of the court, there is a reasonable doubt in your mind as to whether or not the defendant intentionally violated any of the provisions of an applicable revised maximum price regulation as alleged in the amended informa-

tion and as stated in the instructions of the court, you must find the defendant not guilty.

Given by the Court.

McCORMICK

J[66]

“Gentlemen, when you retire to the jury room you will choose one of your number to act as foreman, and you will proceed to deliberate on this case carefully, cautiously, dispassionately, and impartially, and when you shall reach agreement to be reduced on a blank form which the clerk has prepared for your convenience, have it signed by your foreman at the appropriate place, filled in at the appropriate space or spaces, and return into court with the signed verdict.

“Are there any exceptions, gentlemen?

At the conclusion of the Court’s charge, and before the Jury retired, the Defendant requested the following exceptions to be noted to the giving of Government’s Requested Instructions Nos. 1, 3, 5, 6, 8, 10, 11, 12 13 and 14, which exceptions were allowed by the trial court.

The Defendant then requested that his exceptoins be recorded to the refusal of the trial court to give Defendant’s proposed Instructions Nos. 2, 5, 6, 8, 15, 16, 17, 22, 23, 24, 25, 32, 35, 36 and 39, which exceptions were allowed by the trial court.

“The Court: Swear the Officer to take charge.

The Court: Gentlemen, are there any objections to the jurors having the exhibits which have been received in evidence?

Mr. Katz: No objection, your Honor.

Mr. Tolin: No objection.

The Court: Take these with you. Go upstairs, gentlemen.

(Whereupon the jury retired to deliberate.)”

[67]

DEFENDANT’S REQUESTED INSTRUCTION

No. 2

The mere fact that an information has been filed charging the defendant with a crime does not itself raise any presumption or inference as to the guilt of the defendant. The mere fact that he has been brought into court by the ordinary criminal process and is here on trial, should not be considered by you as any evidence whatsoever of his guilt.

Given

Covered Sufficiently

McCORMICK

J [68]

DEFENDANT’S PROPOSED INSTRUCTION

No. 5

You are instructed that the presumption of innocence is not a mere matter of form, to be disregarded by you at your pleasure, but is an essential, substantial part of the law of the land, and binding upon you in this case, and it is your duty to give the defendant the full benefit of this presumption and to

acquit him, unless the evidence in the case convinces you beyond all reasonable doubt of the guilt of the defendant.

Not Given

Covered Sufficiently

McCORMICK

J [69]

DEFENDANT'S PROPOSED INSTRUCTION

No. 6

The jury is instructed that each essential independent fact necessary to complete a chain or series of independent facts tending to establish a presumption of guilt, should be established to the same degree of certainty as the main fact which these independent circumstances taken together tend to establish, that is, each essential independent fact in the chain or series of facts relied upon to establish the main fact, must be established to a moral certainty and beyond a reasonable doubt and to the entire satisfaction of the jury. The circumstances must all concur to show that the defendant committed the crime and must all be inconsistent with any other rational conclusion and must exclude to a moral certainty and to the entire satisfaction of the jury any other hypothesis but the single one of guilt.

Not Given

McCORMICK

J [70]

DEFENDANT'S PROPOSED INSTRUCTION
No. 8

It is not your duty to look for some theory upon which to convict the defendant, but, on the contrary, it is your duty and the law requires you to, if you can reasonably do so, reconcile any and all circumstances that have been shown with the innocence of the defendant, and so acquit him.

Not Given

Sufficiently Covered by Charges Given

McCORMICK

J [71]

DEFENDANT'S PROPOSED INSTRUCTION
No. 15

If you believe from the evidence in this case that any witness in the case was influenced or induced to become such a witness and to testify in this case by any hope held out that he would not be prosecuted for any reason for offenses committed, then the jury should take such facts into consideration in determining the weight and credit which should be given to the testimony of a witness thus obtained.

Sufficiently covered by the instructions given.

Not Given

McCORMICK [72]

DEFENDANT'S PROPOSED INSTRUCTION
No. 16

You cannot base a verdict of guilt upon extra-judicial oral admissions, or statements of a defendant alone, unless there is other evidence independent of such extra-judicial oral admissions or statements which establishes the body of the crime with which defendant is charged, or what is known as the corpus delicti, and if you do not believe after a consideration of all the evidence that the body of the crime or the corpus delicti is established by evidence other than such extra-judicial oral admissions or statements, then and in that event, you cannot consider such extra-judicial admissions or statements for any purpose.

Not Given

Contains also question of law for the court.

McCORMICK

J [73]

DEFENDANT'S PROPOSED INSTRUCTION
No. 17

In order to convict the defendant upon the evidence of circumstances, it is necessary not only that all the circumstances concur to show beyond a reasonable doubt that a crime was committed as alleged in the information, but that the defendant was the one who committed such crime and that they are inconsistent with any other rational con-

elusion. It is not sufficient that the circumstances prove, coincide with, account for, and therefore render probable the theory sought to be established by the prosecution, but they must exclude to a moral certainty every other theory but the single one of guilt, or the jury must find the defendant not guilty.

Not Given

Case not confined to circumstantial evidence.

McCORMICK

J [74]

DEFENDANT'S REQUESTED INSTRUCTION

No. 22

You are instructed that under and by virtue of Maximum Price Regulations No. 148, 169 and 239, any person who in the course of trade or business buys or receives any carcasses or cuts governed by such regulation is equally as guilty as the seller in the commission of the crime. If you find that any witness or witnesses bought or received such carcasses or cuts, each such witness was a principal and the testimony of each such witness should be received with caution and viewed with distrust and you should not accept it unless it so far harmonizes with the other testimony in the case as to leave in your mind no reasonable doubt of its truth.

Not Given

Covered in charge

McCORMICK

J [75]

DEFENDANT'S REQUESTED INSTRUCTION

No. 23

Not given except last paragraph which is given.

McCORMICK

J

You are instructed that Maximum Price Regulation No. 169, issued by the Price Administrator of the Office of Price Administration, governs beef and veal carcasses and wholesale cuts and, in so far as is material to this case, provides as follows:

Section 1364.401 (a) Beef Carcasses and Wholesale Cuts.

On and after December 16, 1942, regardless of any contract, agreement or other obligation, no person shall sell or deliver any beef carcass or any wholesale cut, and no person shall buy and receive beef carcasses or wholesale beef cuts at a price higher than the maximum price permitted by Section 1364.451; and no person shall agree, offer, solicit or attempt to do any of the foregoing. The provisions of this revised maximum price regulation No. 169 shall not be applicable to sales of beef carcasses or beef wholesale cuts to a purchaser, if, prior to December 10, 1942, such beef carcasses or beef wholesale cuts have been received by a carrier other than a carrier owned or controlled by the seller, for shipment to such purchaser. "Person," "Beef carcasses" and "Beef wholesale cut" are defined in Section 1364.55.

Section 1364.402. Exempt sales.

The provisions of this Revised Maximum Price Regulation No. 169 shall not apply

(a) To sales at retail:

(1) As defined in Section 1364.455 with respect to sales of beef; and

(2) As defined in Section 1364.470 with respect to sales of veal; and

(3) As defined in Section 1364.477 with respect to sales [76] of processed products;

(b) To deliveries of beef made to any political subdivision or agency of any state or of the United States under contracts entered into prior to December 10, 1942: provided that this exemption shall not be construed to permit the upward revision of any prices fixed in such contracts.

Section 1364.406. Evasion.

(a) The price limitation set forth in this revised price regulation shall not be evaded, either by direct or indirect methods, in connection with an offer, solicitation, agreement, sale, delivery, purchase or receipt of, or relating to, beef, veal, or processed products, separately or in conjunction with any other commodity or services or by way of any commission, service, transportation, wrapping, packaging or other charge, or discount premium or other privilege, or by tying agreement or other trade understanding, or by changing the selection of, grading, or the style of dressing, cutting, trimming, cooking or otherwise processing or the canning, wrapping or packaging of beef, veal or processed products, or otherwise: Provided, that the

payment by a buyer to a seller for icing services performed by the seller after April 2, 1943, and before delivery of any beef carcass or wholesale cut or veal carcass or wholesale cut to a railroad whose charges are paid directly to such railroad by the buyer shall not be construed as an evasion of such price limitations, if the charge for such icing services is no higher than the cost actually incurred by the seller in performing such service and in no event, higher than the charge which could lawfully have been made by the railroad if such service had been performed by the railroad.

(b) Specifically, but not exclusively, the following practices are prohibited:

(1) Unnecessarily routing beef or veal through any [77] distribution point in order to obtain a higher zone price or for the purpose of making a higher transportation or local delivery charge.

(2) Falsely or incorrectly grading or invoicing beef, veal, or processed products.

(3) Selling or invoicing kosher beef, k o s h e r veal, or kosher processed products to purchasers who are not bona fide buyers of kosher meat.

(4) Selling or invoicing beef or veal at the prices established for sales by hotel supply houses to buyers other than bona fide purveyors of meals, war procurement agencies, or other government agencies.

(5) Offering, selling or delivering beef, veal or any processed product on condition that the purchaser is required to purchase some other commodity.

(6) Making or receiving a charge for delivery on the basis of a route different from that actually followed and in excess of that permitted for the route by which beef or veal was actually delivered.

(7) Selling or transferring title to cattle or calves by a purchaser thereof at a lower price than was paid for such cattle or calves and/or repurchasing, purchasing or receiving title to dressed carcasses or wholesale cuts derived from such cattle or calves after the cattle or calves have been slaughtered by a custom slaughterer.

(8) Charging, paying, billing, or receiving any consideration for or in connection with any service for which a specific allowance has not been provided in this Revised Maximum Price Regulation No. 169.

Section 1364.411. Duty to Maintain Grades.

No person shall sell, offer to sell, deliver or break any beef carcass or veal carcass, unless each such carcass has been [78] graded in accordance with the provisions of this section. No custom slaughterer shall ship or deliver any beef carcass or wholesale cut, or veal carcass or wholesale cut unless each such carcass or wholesale cut has been graded in accordance with the provisions of this section. Each person shall maintain uniform grades, as specified in paragraph (a) of this section; and shall determine his maximum prices upon the basis of such uniform grades, as provided in paragraph (b) of this section.

(a) Uniform grades.

(1) Beef carcasses and wholesale cuts derived

from steers, heifers and cows shall be graded into the following uniform grades: choice, good, commercial utility, and cutter and canner; except that no cow carcass or wholesale shall be graded choice. Beef carcasses and wholesale cuts derived from bulls and stags shall be graded in the same manner, except that no bull carcass or wholesale cut shall be graded choice or good, and no stag carcass or wholesale cut shall be graded choice. In determining the grade of each beef carcass or beef wholesale cut, the "Specifications for Official United States Standards for Grades of Carcass Beef" shall be used, except that the specifications therein for the two grades, prime and choice, shall be combined and treated as a single grade choice, and the specifications therein for the two grades, cutter and canner, shall be combined and treated as a single grade.

(b) Duty to determine maximum prices on the basis of uniform grades.

The word "grade" as used in Sections 1364.451, 1364.452, 1364.466 and 1364.467 and in paragraph (c) of this section, means any uniform grade referred to in paragraph (a) of this section and shall not be construed to mean the private grade of an individual seller.

Irrespective of the price grading system heretofore used by the seller, it shall be the duty of the seller, except as provided [79] in paragraph (c) (3), to have classified into the uniform grades provided for in paragraph (a) of this section, by an official grader of the United States Department of

Agriculture, the beef carcasses and beef wholesale cuts of cattle slaughtered by the seller or sold by the seller, and then to determine the maximum price for each grade of beef carcass and beef wholesale cut by reference to Sections 1364.451 and 1364.452.

(c) Duty to identify products by sex marks.

The sex identification shall be stamped on all bull and stag carcasses and wholesale cuts. The grade and prescribed sex identification of each beef carcass and whole sale cut, and veal carcass and wholesale cut must appear on the seller's invoice.

(1) The appropriate grade for each uniform grade shall be as follows:

Beef Grade

Choice or AA

Good or A

Commercial or B

Utility or C

Cutter)

Canner) or D

Section 1364.451. Maximum Prices for Beef carcasses and wholesale cuts.

Subject to the pricing instructions contained in paragraph (a), the maximum price of each grade of each beef carcass or wholesale cut shall be the maximum price determined as provided in paragraph (b).

(a) Pricing instructions.

(1) Whenever used in this Revised Maximum Price Regulation No. 169, the term "lower price

zone” means a price zone having a lower zone price, and the term “higher price zone” means a price zone having a higher zone price; the words “lower” and “higher” used in the respective terms shall not be construed to refer to the [80] numerical designation of any zone.

(2) Except for the additions permitted in Schedule III hereof, incorporated herein as Section 1364.454, the zone price shall be the delivered price anywhere within the zone to which such price applies. Schedule I (paragraphs (a) to (j) inclusive) hereof, incorporated herein as Section 1364.452, contains a statement describing the geographical limits of each price zone and the zone prices established therefor.

(3) The applicable zone price shall be the price specified in Schedule I (Section 1364.452) for the zone in which is located the seller’s distribution point:

(i) At which the buyer takes actual physical possession of the meat; or

(ii) From which local delivery to the buyer’s place of business begins; or

(ii) From which the meat, consigned to the buyer, (a) is delivered to a common carrier, other than a railroad, for shipment to the buyer, who pays the shipping charges directly to the carrier or (b) is delivered to a railroad for shipment at the carload rate to the buyer who pays the shipping charges directly to the carrier.

(iv) In the case of a less than carload rail shipment, other than an express shipment to a purveyor

of meals, the applicable zone price shall be the price for the zone in which is located the rail unloading station nearest to the buyers' place of business.

(v) On sales to purveyors of meals the distribution point may be, in addition to those listed, the point at which meat consigned to the buyer is delivered to a railway express company for shipment by express to the buyer who pays the shipping charges directly to the carrier.

(4) Except as permitted in paragraph (1), (m), (n), (o), or (p) of Schedule I (Section 1364.452), regardless of any contract, agreement or other obligation, no person shall sell or deliver any [81] beef or any part or portion of any beef carcass and no person in the course of trade or business shall buy or receive any beef or any part or portion of any beef carcass or a beef wholesale cut unless such beef or part or portion is a beef carcass or a beef wholesale cut as defined in Section 1364.455, for which applicable prices have been established.

(5) On and after April 22, 1943, regardless of any contract, agreement or other obligation, no person shall sell or deliver any ground, chopped or comminuted meat containing any proportion of beef or any miscellaneous beef item and no person in the course of trade or business shall buy or receive any ground, chopped or comminuted meat containing any proportion of beef or any miscellaneous beef item unless such ground, chopped or comminuted meat is ground beef and such miscellaneous beef item is a miscellaneous beef item as defined in Section 1364.452 (p), for which applicable prices have been established.

(b) Maximum price.

The maximum price for each grade of each beef carcass or beef wholesale cut shall be the applicable zone price determined in accordance with the provisions of paragraph (a) of this Section 1364.451 and specified in Schedule I, minus the required deductions, if any, specified in Schedule II, plus the permitted additions, if any, specified in Schedule III.

Section 1364.452. Schedule I. Beef price zones and applicable zone prices.

(a) Zone 1.

(1) Zone 1 includes the following area: Washington, Oregon, California and Nevada.

(2) Beef carcass and beef wholesale cut prices applicable in Zone 1.

Subject to the provisions of paragraph (k) of this section, [82] the Zone 1 price for each grade of each class of beef carcass and beef wholesale cut shall be the price specified therefor in paragraph (d) hereof (the applicable Zone 4 price) plus \$1.75 per cwt.

(2) Beef carcass and beef wholesale cut prices applicable in Zone 4.

Subject to the provisions of paragraph (k) the applicable zone prices for Zone 4 are as follows:

(All prices are on dollars per hundredweight bases; the price for any fraction of a hundredweight shall be reduced accordingly.)

Steer or Heifer	Choice or AA	Good or A.	Commercial or B	Utility or C	Cutter Canner or D	(Bologna Bulls (Equivalent cutter and canner grade
(i) Beef carcass or side.....	\$20.00	19.00	17.00	15.00	12.50	13.00
(ii) Hindquarter	22.25	21.00	18.25	15.75	12.50	13.00
(iii) Forequarter	18.00	17.25	16.00	14.50	12.50	13.00
(iv) Round	21.75	20.50	18.25	15.50		
(v) Trimmed full loin.....	29.00	27.25	22.50	19.25		
(vi) Flank	12.50	12.50	12.50	12.50		
(vii) Flank steak	23.00	23.00	23.00	23.00		
(viii) Short loin	32.00	29.75	24.75	21.50		
(ix) Sirloin	26.50	25.25	20.50	17.50		
(x) Cross cut chuck.....	18.00	17.25	15.75	14.25		
(xi) Regular chuck	19.50	18.25	17.00	15.00		
(xii) Brisket	15.75	15.75	13.75	13.75		
(xiii) Foreshank	11.50	11.50	11.50	11.50		
(xiv) Rib	23.50	22.25	20.50	18.00		
(xv) Short plate	13.50	13.50	12.75	12.75		
(xvi) Back	20.50	19.25	18.00	15.75		
(xviii) Triangle	17.25	16.50	15.25	14.00		
(xviii) Arm chuck	18.25	17.25	16.25	14.50		

The applicable Zone 4 price of each cow carcass or wholesale cut of cutter and canner grade or utility grade shall be the same as the Zone 4 price of the carcass or corresponding wholesale cut of steer or heifer of the same grade; the applicable Zone 4 price of each cow carcass or wholesale cut of commercial grade, or good grade shall be the same as the Zone 4 price of the carcass or corresponding wholesale cut of steer or heifer of commercial grade. [83]

The applicable Zone 4 price of each stag carcass or wholesale cut of cutter and canner grade, utility grade, commercial grade or good grade shall be the same as the Zone 4 price of the carcass or corresponding wholesale cut of steer or heifer of the same grade.

The applicable Zone 4 price of each bull carcass or wholesale cut of utility grade or commercial grade shall be the same as the Zone 4 price of the carcass or corresponding wholesale cut of steer or heifer of the same grade. The applicable Zone 4 price of each bologna bull carcass and wholesale cut, which are equivalent to cutter and canner grade are specified above.

The applicable Zone price of each beef carcass or beef wholesale cut which has not been graded or identified by sex mark (required by paragraph (c) of Section 1364.411) when offered for sale, sold or delivered shall be the price of the lowest-priced carcass or corresponding wholesale cut.

(k) For any beef wholesale cut which has been mis-cut or for any piece or portion of beef which

has been cut in a manner not authorized by this Maximum Price Regulation No. 169, the zone price used for the determination of the maximum price shall be the applicable zone price of the lowest wholesale priced wholesale cut.

(o) (2) The fabricated beef cut zone areas 1 to 10 are identical to the beef zone areas set forth in Schedule I (1364.452).

(3) The applicable prices in Zone 1 for fabricated beef cuts and for ground beef and miscellaneous beef items shall be the prices specified in subparagraphs (4) or (5) or (6) hereof respectively (the applicable zone 3 and 4 price) plus the following Zone 1 . . \$1.75.

(4) The fabricated beef cut prices applicable in Zone 3 and 4 for sales by a hotel supply house to purveyors of meals, [84] subject to the provisions in paragraph (k) of Section 1364.452, substituting for the purpose of this paragraph (o) the term "fabricated beef cut" for the term "wholesale cut" contained therein, are as follows:

Grade

Fabricated Beef Cuts

	Choice or AA	Good or A	Commercial or B	Utility or C
(i) Round, rump and shank off.....	\$30.00	\$28.75	\$24.75	\$20.50
(ii) Boneless rump (butt)	25.00	22.75	21.00	18.75
(iii) Hind shank	11.50	11.50	11.50	11.50
(iv) Boneless round	33.00	31.00	27.25	22.50
(v) Inside (top) round	36.75	34.25	29.75	24.25
(vi) Outside bottom round	36.75	34.25	29.75	24.25
(vii) Knuckle (face)	27.50	27.50	24.25	21.25
(viii) Gooseneck boneless round	32.50	29.75	26.50	24.75
(ix) Strip loin (bone in)	49.50	44.75	36.50	29.00
(x) Boneless strip	59.50	53.75	44.00	34.75
(xi) Trimmed full beef tenderloin	58.25	58.25	49.25	49.25
(xii) Trimmed sirloin tenderloin (butt tenderloin) ...	58.25	58.25	49.25	49.25
(xiii) Trimmed tip tenderloin (short tenderloin)	58.25	58.25	49.25	49.25
(xiv) Boneless sirloin (butt)	36.75	34.25	27.00	21.25
(xv) Top sirloin (butt)	45.75	44.00	35.75	26.25
(xvi) Bottom sirloin (butt)	30.25	27.25	20.75	17.75
(xvii) Boneless chuck	26.75	25.00	23.25	20.50
(xviii) Boneless chuck (shoulder clod out)	26.00	24.25	22.75	19.75
(xix) Shoulder clod	29.00	27.75	25.75	23.00
(xx) Boneless briskets (deckle on)	23.50	23.50	20.25	20.25

	Grade			
	Choice or AA	Good or A	Commercial or B	Utility or C
Fabricated Beef Cuts—(Continued)				
(xxi) Boneless briskets (deckle off).....	\$29.50	\$29.50	\$24.75	\$24.75
(xxii) Oven prepared rib	31.50	29.50	27.25	23.50
(xxiii) Rib short ribs, plate short ribs.....	21.00	21.00	19.25	19.25
(xxiv) Rib, boned, rolled and tied.....	39.25	37.00	34.00	29.50
(xxv) Spencer roll	(1)	(1)	41.50	35.75
(xxvi) Regular roll, (rib eye).....	(1)	(1)	64.50	54.25
(xxvii) Boneless short plate	20.00	20.00	19.00	19.00
(xxviii) Cube steak	22.50	22.50	22.50	22.50
(xxix) Flank steak, scored	25.00	25.00	25.00	25.00
(xxx) Club steaks, bone in	50.00	47.00	38.25	34.00
(xxxi) Boneless strip steaks	61.25	55.25	45.25	35.75
(xxxii) Porterhouse steaks (bone in).....	50.00	47.00	38.25	34.00
(xxxiii) T-bone steaks (bone in).....	50.00	47.00	38.25	34.00
(xxxiv) Boneless sirloin steaks	37.75	35.25	27.75	21.75
(xxxv) Top sirloin steaks	47.00	45.25	36.75	27.00

(1) This grade not permitted to be sold and/or delivered.

(5) The fabricated beef cut prices applicable in zones 3 and 4 for sales by packing or slaughtering plants, packing branch [85] houses, wholesaler's or other selling establishments to purveyors of meals subject to the provisions in paragraph (k) of Section 1364.452, substituting for the purposes of this paragraph (o) the term "fabricated beef cut" for the term "wholesale cut" contained therein, are as follows:

Grade

Fabricated Beef Cuts	Grade			
	Choice or AA	Good or A	Commercial or B	Utility or C
(i) Round, rump and shank off.....	\$28.25	\$26.50	\$23.25	\$19.25
(ii) Boneless rump (butt)	22.75	20.50	19.25	17.00
(iii) Hind shank	11.50	11.50	11.50	11.50
(iv) Boneless round	30.50	28.50	25.00	20.75
(v) Inside (top) round	33.50	31.25	27.00	21.75
(vi) Outside bottom round	33.50	31.25	27.00	21.75
(vii) Knuckle (face)	26.00	26.00	23.00	20.50
(viii) Gooseneck boneless round	30.25	27.75	24.50	23.00
(ix) Strip loin (bone in)	46.00	41.50	34.50	28.00
(x) Boneless strip	55.25	49.75	41.50	33.50
(xi) Trimmed full beef tenderloin	54.00	54.00	45.00	45.00
(xii) Trimmed sirloin tenderloin (butt tender)	54.00	54.00	45.00	45.00
(xiii) Trimmed tip tenderloin (short tender)	54.00	54.00	45.00	45.00
(xiv) Boneless sirloin (butt)	34.00	31.75	24.75	18.75
(xv) Bottom sirloin (butt)	28.50	26.25	19.75	16.25
(xvi) Top sirloin (butt)	41.75	39.25	31.75	22.25
(xvii) Boneless chuck	25.00	23.50	21.75	19.25
(xviii) Boneless chuck (shoulder clod out)	24.00	22.50	21.00	18.50
(xix) Shoulder clod	28.00	26.50	24.75	22.00
(xx) Boneless brisket	22.00	22.00	18.75	18.75

Grade

Fabricated Beef Cuts—(Continued)	Grade			
	Choice or AA	Good or A	Commercial or B	Utility or C
(xxi) Boneless brisket (deckle off)	\$27.25	\$27.25	\$23.00	\$23.00
(xxii) Oven prepared rib	29.50	27.50	25.50	22.00
(xxiii) Rib short ribs, plate short ribs	19.00	19.00	17.25	17.25
(xxiv) Rib, boned, rolled and tied	36.50	34.50	31.50	27.25
(xxv) Spencer roll	(1)	(1)	38.25	32.75
(xxvi) Regular roll, (rib eye)	(1)	(1)	58.75	49.25
(xxvii) Boneless short plate	18.75	18.75	17.50	17.50
(xxviii) Cube steaks	21.50	21.50	21.50	21.50
(xxix) Flank steak, scored	23.00	23.00	23.00	23.00
(xxx) Club steaks, bone in	46.50	43.50	35.50	31.50
(xxxi) Boneless strip steaks	57.00	51.25	42.75	34.50
(xxxii) Porterhouse steaks (bone in)	46.50	43.50	35.50	31.50
(xxxiii) T-bone steaks (bone in)	46.50	43.50	35.50	31.50
(xxxiv) Boneless sirloin steaks	35.00	32.75	25.50	19.25
(xxxv) Top sirloin steaks	43.00	40.50	32.75	23.00

(1) This grade not permitted to be sold and/or delivered.

Section 1364.453. Schedule II. Amounts which must be deducted from zone prices listed in Schedule I. [86]

As hereinafter provided, the following shall be deducted from the applicable zone prices:

(a) For beef carcasses and beef wholesale cuts not graded by an official grader. For the sale of any beef carcass or beef wholesale cut which does not bear the grade mark and identification of an official grader of the United States Department of Agriculture at the time of sale, the seller shall deduct 12½¢ per cwt. from the applicable zone price.

(b) Carload discount. For all beef carcasses and/or beef wholesale cuts and/or other meat items subject to this subpart B and Sections 1364.453 and 1364.454, delivered in a straight or mixed carload shipment or sold as a part of a straight or mixed carload sale, the seller shall deduct 25 cents per hundredweight from the applicable zone price.

Section 1364.454. Schedule III. Amounts which may be added to zone prices listed in Schedule I. Subject to the conditions hereinafter provided, the following may be added to the applicable zone price:

(a) For transportation and/or local delivery.

(2) For transportation from the point at which the meat was slaughtered in price zone 1 to a distribution point located in the same price zone as the slaughter point, other than another slaughter, packing or processing plant owned or controlled by the same seller, the seller may add the actual cost of transportation computed at the lowest common carrier rate for the method of transportation used, but in no event more than 25 cents per cwt.

(3) For local delivery made within a radius of 25 miles from a slaughter plant, packing house, car-route unloading point, railroad unloading station or branch house, to the place of business of a seller at retail, wholesaler (not owned or controlled by the shipper or consignor), hotel supply house (not owned or [87] controlled by the shipper or consignor), or commercial user, or the designated delivery point of a war procurement agency, or other governmental agency; or

For local delivery made within a radius of 25 miles from the place of business of a wholesaler or hotel supply house, to the place of business of a seller at retail, purveyor of meals, or commercial user, or the designated delivery point of a war procurement agency, or other government agency: the seller may add 25 cents per cwt.

(5) For local delivery made from a slaughter plant, packing house, car-route unloading point, railroad unloading station, or branch house, located in Price Zone 1, to the place of business of a seller at retail, wholesaler (not owned or controlled by the shipper or consignor), hotel supply house (not owned or controlled by the shipper or consignor), or commercial user, or the designated delivery point of a war procurement agency, or other government agency, located more than 25 miles from such shipping point; or

For local delivery made from the place of business of a wholesaler or hotel supply house located in Price Zone 1 to the place of business of a seller at

retail, purveyor of meals or commercial user, or the designated delivery point of a war procurement agency or other government agency, located more than 25 miles from such shipping point: the seller may add the actual cost of local delivery computed at the lowest common carrier rate for the method of delivery used, but in no event more than 50 cents per cwt.

(6) Notwithstanding any of the provisions of paragraphs (a) (1) to (a) (5), inclusive, of this Section 1364.454, nothing therein contained shall be construed to permit a total charge for transportation and/or local delivery from the point at which the meat was slaughtered to the place of business or receiving point of a retail seller, purveyor of meals, war procurement agency, or [88] other governmental agency or commercial user of more than 50 cents per cwt. in Price Zone 1. The transportation and local delivery additions permitted in this paragraph (a) are on a hundredweight basis and the charge for transportation and/or local delivery for any fraction of a hundredweight shall be reduced accordingly. The additions specified in this paragraph (a) for transportation and/or local delivery may be charged: Provided, That the seller shall itemize separately on an invoice to the buyer the amount charged the buyer for transportation and/or local delivery, except that if such separate statement of transportation charges is prohibited by local law the seller shall maintain in his own record of the transaction a separate statement of any addition for transportation or local delivery which is included in the maximum price charged.

(d) Wholesalers' selling addition.

On sales of any beef carcass or beef wholesale cut not obtained through custom slaughtering, a person who at the time of the sale is a wholesaler may add 75 cents per hundredweight to the applicable zone price: Provided, however, That on and after August 9, 1943, no person shall charge the addition permitted by this Section 1364.454 (d) unless by such date such person shall have filed with the appropriate regional office of the Office of Price Administration a certified statement that the person: (1) is engaged in the business of buying beef carcasses and/or beef wholesale cuts for resale other than at retail; (2) does not own or control, in whole or in substantial part, any slaughtering plant or facilities and is not owned or controlled, in whole or in substantial part, by another person who owns or controls in substantial part any slaughtering plant or facilities; and (3) is not a hotel supply house or peddler truck seller within the meaning of this Revised Maximum Price Regulation No. 169.

(f) Boxing. [89]

On sales to a seller at retail, purveyor of meals, war procurement agency, commercial user (not wholesaler, branch house, hotel supply house, etc.) war procurement agency, or other government agency, the seller may add 15c per cwt. for packing in boxes.

(g) Peddler-truck selling addition.

On a peddler truck sale involving delivery of not more than 100 pounds of beef in a total delivery of not more than 150 pounds of meats and meat prod-

ucts in any one day from such peddler-truck to any buyer's store door, a peddler may add to the prices specified in Section 1364.452 (Schedule I) the sum of \$1.25 per cwt. This addition shall be in lieu of any local delivery and/or transportation addition permitted in Section 1364.454.

Section 1364.455. Definitions applicable to beef.

(a) When used in this Revised Maximum Price Regulation No. 169 and when applicable to beef, the term:

(1) "Person" means any individual, corporation, partnership, association or other organized group of persons, or legal successor or representative of any of the foregoing, and includes the United States or any agency thereof, or any other government, or any agency of any of the foregoing: Provided, That no punishment provided by this Revised Maximum Price Regulation No. 169 shall apply to the United States or to any such government, political subdivision, or agency.

(2) "Carload" means:

(ii) A shipment by motor truck or trucks to a single delivery point of fifteen thousand pounds or more of fresh or frozen wholesale meat cuts and/or cured meat cuts, meat or processed products and/or carcasses, or any combination of the foregoing, as a single bulk sale transaction; and

(iii) Any single bulk sale transaction wherein the buyer takes delivery at the seller's place of business of fifteen [90] thousand pounds or more of fresh or frozen wholesale meat cuts and/or cured meat cuts, meat or processed products and/or carcasses, or any combination of the foregoing.

(3) "Beef" means meat derived from the carcasses of bovine animals which does not qualify as veal as defined in Section 1364.470 (3) of this regulation.

(4) "Car-route unloading point" means any point on a car route at which a stop is made for the purpose of transferring meat to the possession of the buyer or to a truck for local delivery to the buyer.

(5) "Distribution point" includes a packing or slaughtering point, packer's branch house, wholesaler's or jobber's or hotel supplyhouse's warehouse, car route unloading point, or railroad unloading station.

(6) "Local delivery" means delivery by the seller otherwise than by rail, commencing at the seller's distribution point, or in the case of car routes, at the car unloading point and continuing to the buyer's place of business or other point of delivery.

(8) "Beef carcass" means and is limited to the dressed carcass side or sides of beef which shall be dressed with a first and second tail (caudal) vertebrae, kidney knob or knobs and hanging tender left on. The beef carcass shall not be broken in any other manner than provided in paragraph (a) (9) of this Section 1364.455.

(9) "Beef wholesale cut" means and is limited to any of the following cuts meeting the following minimum specifications, derived from the beef carcass but excluding the offal and any item not included herein (all measurements prescribed herein

shall be made with a rigid straight ruler. All cuts shall be made according to the definite guides and measurements specified. Ribs are designated as first to thirteenth, inclusive, counting as the first [91] rib the one which is nearest the neck end of the side.)

(i) "Hind quarter" means the posterior portion of the side remaining after the severance of the twelfth rib forequarter from the side and comprising the round, full loin, including the thirteenth rib, flank, kidney and hanging tender all in one piece, which posterior portion shall be obtained by cutting the beef side between the twelfth and thirteenth ribs, keeping the knife firmly against the twelfth rib while cutting the length of the rib to the point at the end of the rib where the rib joins the rib (costal) cartilage, from which point passing through the cartilage and meat of the flank and short plate in the same straight line, completing the cut.

(ii) "Forequarter" means the anterior portion of the side remaining after the severance of the one-rib hind quarter from the side and comprising the rib, regular chuck, brisket, short plate and foreshank all in one piece, which anterior portion contains the first to the twelfth rib, inclusive. All heart (mediastinal) fat, but no other fat, shall be removed from the forequarter. The skirt (diaphragm) shall not be removed from any cut or part of the forequarter to which it is attached.

(13) "Wholesaler" means a person other than a hotel, supply house or peddler-truck seller who buys beef carcasses and/or beef wholesale cuts for resale other than at retail and who does not own

or control, in whole or in substantial part, any slaughtering plant or facilities and is not owned or controlled, in whole or in part, by another person who owns or controls in substantial part any slaughtering plant or facilities.

(14) "Sales at retail" means sales to the ultimate consumer: Provided, That no wholesaler, processor, packer, slaughterer, branch house, car route, hotel supply house, purchaser for retail, commercial user, purveyor of meals, war procurement agency, or other government agency, shall be deemed to be an ultimate consumer, [92] except that a sale to a purveyor of meals on usual terms by a retailer, at least eighty percent of whose sales of meat during the preceding calendar month were made to ultimate consumers, shall be deemed a sale at retail.

(15) "Peddler-truck sale" means a sale of beef from a truck by a person who purchases beef at or below the maximum price from a seller with whom he has no other financial affiliation or relationship, who takes a delivery at the seller's place of business, and who does not sell or deal in meat in any manner other than sales out of stock carried in a truck, owned and driven by him; Provided, that the first record of the transaction is made by the salesman concurrently with the delivery of the products sold.

(b) (2) "Purveyor of meals" means:

(i) Any restaurant or hotel, cafe, cafeteria or other establishment which purchases meats and where meals, food portions or refreshments are served for a consideration. [93]

DEFENDANT'S REQUESTED INSTRUCTION

No. 24

You are instructed that if you find as a fact that the Revised Maximum Price Regulation No. 169 heretofore read to you, is so framed, worded, drawn or set forth as to be incomprehensible or unintelligible to a person of ordinary understanding and intelligence, then you must find the defendant not guilty of violating the provisions of said Maximum Price Regulation No. 169.

Not given.

McCORMICK

J [94]

DEFENDANT'S REQUESTED INSTRUCTION

No. 25

You are instructed that if you find Revised Maximum Price Regulation No. 169 so ambiguous, indefinite, uncertain and unintelligible that it cannot be understood or comprehended with a reasonable degree of certainty by a person of ordinary intelligence and understanding, you must find the defendant not guilty.

No application.

Not given.

McCORMICK

J [95]

DEFENDANT'S REQUESTED INSTRUCTION

No. 32

You are instructed that if you find from the evidence that the defendant did not make the sales

charged in the information, you must find the defendant not guilty.

Not given.

Too general counts.

Change "offer to sell" as well as "sales."

McCORMICK

J [96]

DEFENDANT'S REQUESTED INSTRUCTION

No. 35

You are instructed that if you are unable to determine from the evidence the maximum prices permitted by Maximum Price Regulations No. 148, 169 and 239 for the grade, type and kind of beef, pork and lamb, charged to have been sold by defendant, or if there is a reasonable doubt in your mind as to what were the maximum prices permitted therefor by such regulation on the date of each sale defendant is charged to have made, you must find the defendant not guilty.

Not given.

McCORMICK

J [97]

DEFENDANT'S REQUESTED INSTRUCTION

No. 36

If you find from the evidence that no maximum price has been established by Revised Maximum Price Regulation No. 169 for the type or kind or grade of beef carcasses or wholesale cuts alleged, which defendant may have sold or delivered, if any, you are instructed that you must find the defend-

ant not guilty of violating Revised Maximum Price Regulation No. 169.

Not given.

McCORMICK

J [98]

DEFENDANT'S PROPOSED INSTRUCTION

No. 39

If, after a consideration of the whole case, any juror shall entertain a reasonable doubt of the guilt of the defendant, it is the duty of such juror so entertaining such reasonable doubt to vote for a verdict of "not guilty".

The defendant is presumed to be innocent until proven guilty; that presumption accompanies him throughout the trial; it goes with you to your retirement to consider your verdict and operates until you have arrived at a verdict. This presumption will avail to acquit the defendant unless it be overcome by sufficient proof of his guilt to convince you, and each of you, to a moral certainty and beyond all reasonable doubt of his guilt. You must examine the evidence in the light of presumption of innocence, and unless you find the evidence sufficiently strong to overcome this presumption, and, further, to satisfy you beyond all reasonable doubt of the guilt of the defendant, he is entitled to a verdict of acquittal at your hands.

Not given.

Sufficiently instructed on principle.

McCORMICK

J [99]

On November 11, 1943, the Jury returned a verdict of guilty as to the charges contained in Count X, and not guilty as to Counts VIII, XI and XII.

The Court fixed November 30, 1943, as the time for pronouncement of judgment and sentence, and on November 30, 1943, the Court pronounced judgment and sentence on said Count X, imposing a fine in the sum of \$1,000.00, and imprisonment in jail, for a period of six months, which sentence of imprisonment was suspended and the Defendant placed on probation for a period of one year.

On December 4, 1943, Defendant filed his notice of appeal from said judgment. On December 11, 1943, the court made an order staying execution and allowing Defendant to remain on bail pending appeal. Contemporaneously Defendant deposited \$1,000.00 in the registry pending appeal as provided for by law in such cases.

On December 24, 1943, the court, upon application of Defendant, made an order extending the time for lodging the proposed Bill of Exceptions and Assignments of Error to and including the 20th day of January, 1944.

Thereafter, the following Stipulation was entered into:

“In the United States Circuit Court of Appeals
for the Ninth District

No. 10629

“CLARENCE O. FLANNAGAN,

Appellant,

UNITED STATES OF AMERICA,

Appellee.

STIPULATION

Whereas, the Government's and the defendant's exhibits in evidence in the above entitled action, which are on file in the office of the Clerk of the United States District Court, Southern District of California, Central Division, are in many instances very difficult, and in some cases impossible to reproduce either by [100] typewriting or by printing, and

“Whereas, the exhibits contain matters, which both parties desire the Court to see in their original form, and

“Whereas, some of said exhibits contain notations in the handwriting of various persons which both parties believe should be certified directly to the United States Circuit Court of Appeals for the Ninth Circuit by the District Court for the purposes of this appeal, and

“Whereas, both the appellant and appellee desire to avoid the expense of copying all of these bodily into the Bill of Exceptions,

“Now, Therefore,

“It Is Hereby Stipulated and Agreed by and be-

tween the appellant Clarence O. Flannagan, and the appellee, United States of America, by and through their respective attorneys, subject, nevertheless, to the approval of the United States Circuit Court of Appeals for the Ninth Circuit, as follows:

“1. That such and all of the hereinafter mentioned and designated exhibits in evidence, which are herein referred to respectively by the numbers and letters given by them by the Clerk of said District Court at the time of the trial herein, may be deemed by reference to be incorporated in the Bill of Exceptions both generally and respectively where and wherever references are made to them by such numbers in the body and context of said Bill of Exceptions to the same effect and purport as though each and all of said exhibits were fully set forth, word for word, figure for figure, in said Bill of Exceptions. [101]

“2. That the District Court may, after passing upon appellee’s proposed amendments thereto, sign and settle said Bill of Exceptions, and may include therein a copy of this Stipulation in lieu of including therein, either in substance or in full copies of each and all of the hereinafter designated exhibits in evidence, and that thereupon, each of said exhibits shall be deemed to be included in said Bill of Exceptions to the same effect and purport as though each and all of said exhibits were fully set forth therein as aforesaid.

“3. That the exhibits to be so included are as follows:

Government's Exhibit No. 1

“ “ “ 2

“ “ “ 3

“ “ “ 4

“ “ “ 5

“ “ “ 6

“ “ “ 7

“ “ “ 8

“ “ “ 9

“ “ “ 10

“ “ “ 10

Defendant's Exhibit No. A

“4. That the United States District Court in and for the Southern District of California may make an order that all of the foregoing designated exhibits be sent to the United States Circuit Court of Appeals for the Ninth Circuit, and for the safe-keeping, transportation, and return thereof, at the cost of the appellants, to be paid to the Clerk of the District Court upon demand.

“5. This stipulation in nowise constitutes a waiver of any objections and exceptions to the introduction of any exhibits by the District Court.

[102]

“Dated: March 9, 1944.

“CHARLES H. CARR

United States Attorney

JAMES M. CARTER

Asst. United States Attorney

ERNEST A. TOLIN

Asst. United States Attorney

JOHN E. GLOVER

Attorney for Defendant and
Appellant

“It Is so Ordered:

.....

.....

Judge of the United States
Circuit Court of Appeals
for the Ninth Circuit.”

CONCLUSION

Inasmuch as the matters above set forth do not fully appear in the record and in the judgment roll, the Defendant, Clarence O. Flannagan, tenders this, his Bill of Exceptions, and prays that the same may be signed and approved by the Honorable Paul J. McCormick, Judge of this Court.

Dated: This 15th day of March, 1944.

CANTILLON & GLOVER

By RICHARD H. CANTILLON

By R. A. G.

Attorneys for Defendant

The foregoing Bill of Exceptions has been examined and is approved.

Dated: This 14 day of March, 1944.

CHARLES H. CARR

United States Attorney

By ERNEST A. TOLIN

Assistant United States At-
torney

Attorneys for the Govern-
ment-Plaintiff [103]

The foregoing Bill of Exceptions, together with the Exhibits therein mentioned and made a part hereof by Stipulation, contains all the evidence adduced on the trial of this cause, and with correction on p. 6, l. 15 made by me to conform to transcript of official reporter correctly shows the various proceedings during the trial, as well as subsequent thereto. The same being true and correct, it is accordingly settled and allowed as a true Bill of Exceptions in this cause.

Dated: This 15th day of March, 1944.

PAUL J. McCORMICK

Judge of the United States
District Court

[Endorsed]: Filed Mar. 15, 1944.

[Endorsed]: No. 10629. United States Circuit Court of Appeals for the Ninth Circuit. Clarence C. Flannagan, Appellant, vs. United States of America, Appellee. Transcript of Record. Upon Appeal from the District Court of the United States for the Southern District of California, Central Division.

Filed April 15, 1944.

PAUL P. O'BRIEN

Clerk of the United States Circuit Court of Appeals
for the Ninth Circuit.

United States Circuit Court of Appeal
for the Ninth Circuit

Docket No. 10629

CLARENCE O. FLANNAGAN,

Appellant,

vs.

UNITED STATES OF AMERICA,

Respondent.

POINTS ON WHICH APPELLANT INTENDS
TO RELY ON APPEAL, AND DESIGNA-
TION OF PARTS OF THE RECORD
WHICH APPELLANT BELIEVES NEC-
ESSARY FOR A CONSIDERATION
THEREOF

(RULE 19)

In conformity with the provisions of sub-division
6 of Rule 19 of Rules of Practice of the United

States Circuit Court of Appeals, for the Ninth Circuit, Appellant, Clarence O. Flannagan, sets out:

I.

POINTS ON WHICH APPELLANT INTENDS
TO RELY ON APPEAL

The points on which Appellant, Clarence O. Flannagan, intends to rely on appeal are as follows:

1. Each and every Assignment of Error set out by Appellant, Clarence O. Flannagan, in the document designated, "Assignments of Error", filed by said Appellant.

II.

DESIGNATION OF PARTS OF RECORD
WHICH APPELLANT BELIEVES NEC-
ESSARY FOR A CONSIDERATION
THEREOF

1. For the consideration of the points upon which Appellant intends to rely on appeal, it is designated that the entire record as certified to the Clerk of the United States Circuit Court of Appeals, for the Ninth Circuit, by the Clerk of the United States District Court for the Southern District of California, Central Division, be printed.

Dated: This 24th day of April, 1944.

CANTILLON & GLOVER

By RICHARD H. CANTILLON

Attorneys for Appellant,

Clarence O. Flannagan

Received copy of the within Points on Which Appellant Intends to Rely on Appeal, Etc., this 24th day of April, 1944.

CHARLES H. CARR,

United States Attorney

By JAMES H. CARTER

Assistant United States At-
torney

By M. WENTWORTH

Attorneys for Plaintiff-
Government

[Endorsed]: Filed April 26, 1944. Paul P.
O'Brien, Clerk.

No. 10629

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

CLARENCE O. FLANNAGAN,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPELLANT'S BRIEF.

CANTILLON & GLOVER,
832 Petroleum Building, Los Angeles,

Attorneys for Appellant.

FILED

JUL 13 1944

PAUL P. O'BRIEN

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No. 10629

IN THE

United States Circuit Court of Appeals
FOR THE NINTH CIRCUIT

CLARENCE O. FLANNAGAN,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPELLANT'S BRIEF.

A.

Jurisdiction.

This is an appeal taken from a judgment and sentence pronounced in the District Court of the United States, in and for the Southern District of California, Central Division, on the 30th day of November, 1943, which judgment was based upon a verdict of guilty upon Count X of an Amended Information, which Amended Information was filed in said Court on the 11th day of October, 1943, the said Appellant in said Count X having been charged with violating the provisions of Section 1364.401 of Revised Maximum Price Regulation No. 169 (7 Fed. Reg. 10381) as amended, issued pursuant to Section 2 of the Emergency Price Control Act of 1942, in selling beef at a price in excess of the maximum permitted.

B.

Statement of the Case.

The court upon sustaining a demurrer to the original information granted leave to the Government to file an Amended Information, which Amended Information was filed the 11th day of October, 1943. The Amended Information contained twelve counts charging a violation of Revised Maximum Price Regulation No. 169, Revised Maximum Price Regulation No. 239 and Revised Maximum Price Regulation No. 148, issued pursuant to the Emergency Price Control Act of 1942 [Tr. of R. pp. 23 to 35, **inclusive**].

On the 16th day of October, 1943, Appellant filed a Notice of Motion to Quash and Set Aside the Amended Information [Tr. of R. p. 36], Appellant also having filed a Demurrer [Tr. of R. pp. 37 to 56] to the Amended Information on said date.

On the 18th day of October, 1943, the court made its order denying the Motion to Quash and overruled the Demurrer [Tr. of R. pp. 56 and 57]. Thereupon Appellant entered a plea of not guilty to each of the twelve counts of the Amended Information, and the cause was then set for trial on the 9th day of November, 1943.

On the 23rd day of October, 1943, Appellant filed a Notice of Motion for a Bill of Particulars [Tr. of R. pp. 57 to 63]. The court on the 1st day of November, 1943, made its order denying the Motion for Bill of Particulars.

On the 9th day of November, 1943, the cause was called for trial in the District Court before the Honorable Ben Harrison.

The Government announced it was ready to proceed to trial on Counts VIII, X, XI and XII, and moved for dismissal of the remaining counts, and the Court made its order dismissing the remaining counts of the Amended Information.

Said cause was transferred for trial before the Honorable Paul J. McCormick, District Judge. The Appellant was represented by William Katz, Esq., and the Government was represented by Ernest A. Tolin, Esq., Assistant United States Attorney, and Stanley Jewel, Esq., Attorney, O. P. A. [Tr. of R. p. 65].

The trial proceeded and after the jury was duly selected, accepted and sworn, the Government proceeded to present its case and witnesses were called, sworn and examined.

At the conclusion of the Government's case, the Appellant made a motion for a directed verdict of acquittal on the remaining Counts VIII, X, XI and XII, and each of them, upon the ground that the evidence was insufficient to sustain a conviction, which motion as to each of said counts was denied and exceptions taken [Tr. of R. p. 192].

The Appellant undertook the presentation of the evidence in support of his defense; the Appellant and other witnesses were called, sworn and examined.

Appellant rested his case on the 10th day of November, 1943 [Tr. of R. p. 66]. No rebuttal was offered by the Government and it also rested [Tr. of R. p. 67].

Both sides having rested, Appellant moved the court for a directed verdict as to the remaining counts, namely, Counts VIII, X, XI and XII, upon the grounds that the evidence introduced by the Government was insufficient

to sustain the charges contained in said counts, and each of them. Said motion was by the Court denied and Appellant duly excepted thereto [Tr. of R. p. 204].

Thereupon, Assistant United States Attorney Ernest A. Tolin argued to the jury on behalf of the Government. Attorney William Katz argued on behalf of Appellant, and Assistant United States Attorney Tolin made a closing argument to the jury [Tr. of R. p. 67].

Prior to the giving of instructions a discussion was had in Chambers pursuant to the court's request. Objections were made to certain instructions proposed by the Government by counsel for Appellant, and Appellant also urged the court to give certain instructions proposed by Appellant. The objections made by Appellant were overruled and the request to give certain instructions for Appellant was refused, and thereupon the court instructed the jury on the law of the case [Tr. of R. pp. 205 and 206].

At the conclusion of the court's charge, and before the jury retired, Appellant requested exceptions to be noted to the giving of certain Government's instructions, which exceptions were allowed. Appellant then requested that exceptions be noted to the refusal of the court to give certain of Appellant's proposed instructions, which exceptions were allowed by the trial court.

The bailiff was sworn to take charge of the jury, and the jury retired to deliberate. At 12:30 A. M., November 11, 1943, the jury returned into court and the foreman announced that the jury had agreed upon a verdict.

The jury found Appellant guilty on Count X, and not guilty on Counts VIII, XI and XII. The court thereupon fixed November 30, 1943 as the time for pronounce-

ment of judgment and sentence, and on said date pronounced judgment and sentence upon Count X, imposing a fine of \$1,000.00 and imprisonment in jail for a period of six months. Said sentence was suspended and Appellant placed on probation for a period of one year [Tr. of R. p. 261].

On the 4th day of December, 1943, Appellant filed a Notice of Appeal under Rule III. On the 11th day of December, 1943, the court made an order staying execution, allowing Appellant to remain on bail pending appeal. Contemporaneously, Appellant deposited \$1,000.00 in the registry pending appeal.

On the 24th day of December, 1943, the court, upon application of Appellant, made an order extending time for lodging Proposed Bill of Exceptions and Assignments of Error [Tr. of R. p. 261]. The Bill of Exceptions and Assignments of Error were filed within the time prescribed by law [Tr. of R. p. 261].

C.

Summary of the Evidence.

Although the Bill of Exceptions contains some evidence not connected with the charges contained in Count X of the Amended Information, Appellant will limit this summary to evidence pertaining to this count only.

James Kilduff resides at Anaheim, California, and was on the 24th, 25th and 28th days of June, 1943, engaged in the retail meat business in said city, under the name of "Kilduff's Quality Meats."

In such business, he purchased meat and re-sold it to the consuming public. He first became acquainted with the Appellant two or three years prior to the time of

trial, but had no business dealings with him until June 24, 1943. On this date, Appellant was at Kilduff's market with Appellant's truck. Appellant stated to Kilduff that he had heard that Kilduff wanted some meat, and said he (Appellant) could supply some, but not all Kilduff needed, and further stated that there was an overage, but he did not state what it was for.

Kilduff bought some meat and received from Appellant an invoice bearing date June 24, 1943, which is Government's Exhibit No. 1 [Tr. of R. pp. 142 and 144].

Kilduff received the meat which was listed on the invoice and paid Appellant the price that appears on the invoice. Appellant told Kilduff how much more in cash he (Kilduff) owed. Kilduff could not remember the amount, but it figured out about 7¢ per pound on the beef.

Kilduff had a conversation with Appellant relative to future deliveries of meat to Kilduff's market, and Kilduff requested Appellant to bring another beef the next day.

On the next day, it being June 25, 1943, the Appellant brought the beef in to Kilduff's market. At that time Kilduff received an invoice, being Government's Exhibit No. 2 [Tr. of R. p. 150].

Kilduff received from Appellant the items listed on the invoice. Kilduff paid by check the amount of the invoice, the check being Government's Exhibit No. 3 [Tr. of R. p. 147].

Kilduff at that time gave Appellant some money, but there was nothing said by either Appellant or Kilduff as to the sum that was given Appellant. Appellant did not do any calculating in Kilduff's presence, and the manner in which Kilduff determined how much money to give

Appellant, other than the amount that appears on the check (Government's Exhibit No. 3) was that Appellant told him how much. Kilduff did not remember how it figured out in money, nor the amount of money, nor the approximate amount of money.

Relative to the items listed on the invoice [Government's Exhibit No. 2; Tr. of R. p. 150] Kilduff received all six items, but stated that the sixth item was a whole steer rather than a half steer, as shown on the invoice.

(Kilduff had a further transaction on June 28, 1943, wherein he purchased other meats from Appellant, Appellant delivering an invoice which is Government's Exhibit No. 4 [Tr. of R. p. 152], and Kilduff gave Appellant a check in the amount of the invoice, which check is Government's Exhibit No. 5 [Tr. of R. p. 153]. Kilduff remembered he gave Appellant something else at that time, but he did not know how much, or remember how it figured out. This testimony referred to Count XI [Tr. of R. p. 151].)

Kilduff was shown a two-page memorandum by counsel for the Government, and was asked to examine it and see if it refreshed his memory [Tr. of R. p. 155]. The memorandum shown the witness is Government's Exhibit No. 6 for identification [Tr. of R. pp. 157 and 158].

After examining the memorandum Kilduff testified that he paid Appellant over and above the amount of the check, the sum of \$39.48, on June 25, 1943; and on June 28, 1943, the sum of \$29.75.

Appellant, when he first came to see Kilduff on June 24, 1943, came at Kilduff's request, Kilduff having gotten in touch with some third party to inform Appellant to see Kilduff. Kilduff requested Appellant to spare some

meat off his truck, as Kilduff's meat supplier was out of business. Appellant told Kilduff, in order to supply Kilduff with meat, it would be necessary to take meat away from some other customer, as all of the meat he had on the truck that particular day was sold.

Appellant told Kilduff that there were certain additional charges he could make by reason of the fact of delivery. Kilduff was not concerned so much with what Appellant told him about prices as he was in getting meat supplied to him.

Appellant told Kilduff that Kilduff could get the same thing at the packer at a cost less than Appellant would charge, and that if there was any way Kilduff could get it from the packer he should do so. Appellant did not tell Kilduff that any additional sums he would be required to pay were reflected in the invoice.

On June 25th when Appellant presented the invoice, Kilduff wrote out a check for the amount shown on the invoice and handed it to Appellant. At that time Kilduff handed Appellant other consideration, but Kilduff could not recall the amount, nor whether the additional amount was for any particular item on the invoice. He did not know what it was for.

Item 6 on the invoice (Government's Exhibit No. 2) consisted of an entire carcass, and the weight shown on the invoice, namely, 564 pounds, was correct.

Stanley C. Gorman, an investigator with the O. P. A., visited Appellant at Appellant's home at Newport Beach,

during the latter part of June or the first of July. At that time he had a conversation with Appellant in the presence of a Mr. Klein, wherein Appellant stated that he was doing business under the title of "West Coast Meat Company," and that he (Appellant) was the company. Appellant was asked who he purchased meat from, and he named several packers, and stated that he was not required to pay any price to the packers over and above ceiling prices.

Appellant was asked to produce his checks, which he did. Appellant inquired of Gorman and Klein why the investigators had browbeaten Kilduff into giving a false statement.

Gorman at that time had a further conversation with Appellant wherein he stated that he wanted information from Appellant, and that he and Klein were interested in peddlers' rights and were interested in protecting Appellant's rights, if any squeeze had been put on by the packers; that the primary purpose of the visit to Appellant's home was to secure a list of Appellant's customers, which list was furnished [Tr. of R. pp. 191 and 192].

Appellant testified that he was the driver-salesman for the West Coast Meat Company, and had been since 1939; that mutual friends of Kilduff and Appellant had requested Appellant to see Kilduff, which Appellant did on June 24, 1943. At that time Kilduff told Appellant he had lost his source of supply, particularly of beef, and wanted to know if Appellant could supply him with some. On that date Appellant delivered to Kilduff the items shown on

the invoice [Government's Exhibit No. 1; Tr. of R. p. 193]. Appellant stated to Kilduff that he would have to charge more than the packers would charge. Appellant received Kilduff's check but did not receive any consideration or thing of value except the check. Appellant did not at any time charge, demand, collect, or receive any cash, or any consideration or thing of value, except the check for the items shown on the invoice represented by Government's Exhibit No. 1 [Tr. of R. p. 194].

A discussion was had on June 24, 1943, wherein Appellant stated to Kilduff that if he (Kilduff) went to the packing house district, quite often he would be able to find a "B" grade of beef that would suit his purpose just as well as an "A" grade; that the difference between the cost of "A" and "B" grades of beef, together with the difference in the amount Appellant could charge him for the beef over and above what the packers would charge would amount to as much as 6¢ or 7¢ [Tr. of R. p. 194].

On June 25, 1943, Appellant delivered to Kilduff meat consisting of items reflected in the invoice (Government's Exhibit No. 2). Appellant received Kilduff's check in payment of the invoice, which check is Government's Exhibit No. 3. Appellant did not receive money, cash, or other consideration, excepting the check in payment for the items delivered on June 25, 1943 [Tr. of R. p. 195].

Appellant had a conversation with Klein and Gorman at Appellant's home in Newport, at which time Appellant was told that Klein and Gorman had information that the

West Coast Meat Company had violated ceiling regulations. Appellant stated to them that they were mistaken; there had been no violation on the part of either Appellant or the West Coast Meat Company.

These investigators told Appellant that it did not matter as they were not interested in prosecuting him; that their interest was in trying to get evidence against the big packers; that Appellant was in a position to give such information or assist, and if he did so, there would be no charges placed against Appellant. Appellant stated to them that he had no such information, and was not in a position to help them get evidence; whereupon, the investigators told Appellant that if he felt that way about it, they would place charges against him.

Concerning the invoice (Government's Exhibit No. 1) Appellant figured the prices that appear thereon and figured the additions that were allowed a person doing business as the West Coast Meat Company, and included those additions in the prices. The additions included a charge for making delivery in that area. To the best of Appellant's knowledge, the prices on the invoice (Government's Exhibit No. 2) were the ceiling prices the West Coast Meat Company was allowed to charge for that day.

This same method of computation and the inclusion of extra charges was used in connection with the other invoices.

D.

**Specification of Numbers of the Assigned Errors to
Be Relied Upon.**

Appellant, Clarence O. Flannagan, relies upon the following Assignments of Error by their respective numbers, and refers to the pages of the record where they appear :

Assignment of Error No. I [Tr. of R. p. 87].

Assignment of Error No. II [Tr. of R. pp. 87 and 88].

Assignment of Error No. III [Tr. of R. pp. 88 and 89].

(These three Assignments will be argued under one heading.)

Assignment of Error No. VI [Tr. of R. p. 91].

Assignment of Error No. VIII [Tr. of R. pp. 92 and 93].

(These two Assignments will be argued under one heading.)

Assignment of Error No. X [Tr. of R. pp. 94 and 95].

Assignment of Error No. XI [Tr. of R. p. 95].

(These two Assignments will be argued along with Assignments of Error Nos. I, II and III.)

Assignment of Error No. XX [Tr. of R. pp. 103 and 104].

E.

ARGUMENT.

POINT I.

The Trial Court Committed Prejudicial Error in Denying Appellant's Motion to Quash and Set Aside the Amended Information, and/ or Overruling the Demurrer of Appellant as to Count X of the Amended Information, and/ or Denying the Motion and Demand of Appellant to Compel the Government to Furnish a Bill of Particulars as to Count X, and/or Denying the Motion of Appellant for a Directed Verdict Made at the Conclusion of the Government's Case, and/or Denying the Motion of Appellant for a Directed Verdict After Both the Government and the Appellant Had Rested (Assignments of Error I, II, III, X and XI).

ASSIGNMENT OF ERROR No. 1.

That the Court erred in denying the Motion to Quash and Set Aside the Amended Information, made by this Defendant on the 18th day of October, 1943, as to Count X of said Amended Information, which Motion was based upon the following grounds:

That said Count X fails to state facts sufficient to constitute a criminal offense and that the laws, rules and regulations upon which said Information purports to be based are arbitrary, discriminatory, unreasonable, invalid, unconstitutional and void.

That Defendant duly excepted to said ruling of the trial court. [Tr. of R. p. 87.]

ASSIGNMENT OF ERROR NO. 2.

That the Court erred in overruling the Demurrer of the Defendant to Count X of the Amended Information, which Demurrer was based upon the following grounds; and to which ruling the Defendant duly excepted:

(a) That Count X of said Amended Information fails to state facts sufficient to constitute a criminal offense;

(b) That Count X of said Amended Information is uncertain in that it cannot be determined therefrom:

1. What crime, if any, Defendant is alleged to have committed:

2. Whether the sale of the beef alleged to have been sold by Defendant was made by Defendant as a “wholesaler”, “peddler truck sale”, “independent wholesaler”, “hotel supply house”, “slaughterer”, “packer”, or otherwise.

3. Whether the sale alleged to have been made by Defendant was made to a wholesaler, retailer, purveyor of meals or otherwise.

4. In what respects, if any, the purported crime attempted to be alleged in said Count X differs from the purported crimes attempted to be alleged in Counts I, II, III, IV, V, VI, VII, IX and XII of said Amended Information.

(c) That Count X of said Amended Information is indefinite in each and all of the respects in which it is heretofore set forth to be uncertain.

(d) That Count X of said Amended Information is ambiguous in each and all of the respects in which it is heretofore set forth to be uncertain and indefinite. [Tr. of R. pp. 87 and 88.]

ASSIGNMENT OF ERROR No. 3.

That the Court erred and abused its discretion in denying the Motion and Demand of the Defendant to compel the Government to furnish Defendant a Bill of Particulars as to Count X of the Amended Information, which was as follows:

(a) What grade of beef Defendant is alleged to have sold and whether such beef was a “beef carcass” or a beef cut or beef cuts, and if a beef cut, or beef cuts, the kind and type of cut or cuts;

(b) What the maximum price is, was or is claimed to be, or have been, for the beef alleged to have been sold by Defendant;

(c) Whether the sale of the beef alleged to have been sold by Defendant was made by Defendant as a “wholesaler”, “peddler truck sale”, “independent wholesaler”, “hotel supply house”, “slaughterer”, “packer”, or otherwise.

The Defendant duly excepted to the ruling thereon. [Tr. of R. pp. 88 and 89.]

ASSIGNMENT OF ERROR No. 10.

That the Court erred in denying the Defendants motion for a directed verdict, made at the conclusion of the Government’s case, based on the grounds: (1st that the allegations contained in Count X did not set forth the commission of an offense against the Government; and (2d) that the evidence adduced by the Government was insufficient to establish the commission of the offense alleged in Count X. The Defendant duly excepted to the ruling on the motion. [Tr. of R. pp. 94 and 95.]

ASSIGNMENT OF ERROR No. 11.

That the Court erred in denying the motion of the Defendant for a directed verdict made after both the Government and the Defendant had rested their respective cases, based on the grounds: (1st) that the allegations contained in Count X did not set forth the commission of an offense against the Government; and (2d) that the evidence adduced by the Government was insufficient to establish the commission of the offense alleged in Count X. The Defendant duly excepted to the ruling on the motion. [Tr. of R. p. 95.]

All of the foregoing Assignments of Error deal with the sufficiency of the allegations contained in Count X of the Amended Information wherein Appellant contends that the allegations set forth do not state facts sufficient to constitute a criminal offense.

It is Appellant's contention that the insufficiency exists by reason of the failure to allege: (1) the status of Appellant—that is, the particular type of seller Appellant was at the time of the alleged sale; and (2) the manner in which the alleged ceiling price of $27\frac{1}{4}\phi$ per pound was arrived at by the Government.

It will be noted that the allegations of Count X do not denote Appellant a "wholesaler", "peddler truck seller", "independent wholesaler", "hotel supply house", "slaughterer", "packer" or otherwise describe his capacity or his business [Tr. of R. p. 32].

There is a bare allegation that the maximum price permitted was $22\frac{1}{4}\phi$ per pound. No allegations are made which in the slightest way tend to indicate how or in what manner this figure was arrived at, neither does it indicate whether the price was a wholesale or retail maximum price, nor does it appear whether the $22\frac{1}{4}\phi$ per pound was the maximum price at the time of the alleged sale.

The case of *United States v. Johnson, et al.*, 53 Fed. Supp. 167 (Dist. Ct. of Del. 1943) in part deals with the sufficiency of an indictment where a maximum price is alleged.

The Defendant attacked the indictment on the ground that there was a failure to allege either (1) the manner in which the Government arrived at such maximum price; or (2) whether the maximum price alleged was the retail or wholesale maximum price.

In the opinion the court states:

“Since the act and the regulation do not establish any specific ceiling price for the commodity *sub judice*, defendants are entitled to know not only what the government claims the ceiling price to be, but also the manner in which it arrived at this conclusion.”

Further the opinion states:

“* * * and again there is no allegation as to whether these prosecutions are for violations of the retail ceiling or the wholesale ceiling.”

In sustaining the defendants' general demurrer the court states:

"I conclude that these typical twelve indictments are insufficient because it is impossible to tell from the acts alleged (even if taken as true) whether a crime has been committed."

Relative to the failure to allege the status of Appellant, we rely upon the case of *United States v. Siegel Bros., Inc.*, 52 Fed. Supp. 238 (U. S. Dist. Ct. Wash., 1943).

Here defendants were charged with a violation of Revised Maximum Price Regulation No. 169 in selling beef in excess of ceiling prices.

A demurrer was interposed by defendants, one of the grounds of demurrer being that defendants' status was not alleged.

The court said:

"In so far as the demurrer based upon the failure to classify defendants as wholesalers, it is confessed."

In view of error being confessed, it was unnecessary for the court to pass upon the point; however, by analogy to the case of *United States v. Johnson, supra*, wherein the opinion alludes to the failure to allege the ceiling price as being the wholesale or retail ceiling price, it appears that it is essential to allege the capacity or status of Appellant at the time of the alleged sale.

POINT II.

The Trial Court Committed Prejudicial Error in Allowing the Witness Kilduff to Examine Government's Exhibit No. 6 for Identification and Admitting the Testimony of Said Kilduff Concerning Matters Contained in Said Memorandum (Assignments of Error Nos. 6 and 8).

ASSIGNMENT OF ERROR No. 6.

That the Court erred in allowing the Government's Witness Kilduff, while on direct examination, to refer to and inspect the writing, Government's Exhibit No. 6 for identification, over the objections of the Defendant that the said writing was: (1) incompetent; (2d) irrelevant; (3rd) immaterial; (4th) hearsay; and (5th) that it was matter having no bearing on the case, to all of which the Defendant duly excepted.

ASSIGNMENT OF ERROR No. 8.

That the Court erred in overruling the objection of the Defendant made after the Witness Kilduff had read and inspected the writing, Government's Exhibit No. 6, for identification, to the question, and in allowing the answer relative to an asserted overage paid for meat on June 25, 1943:

Q. By Mr. Tolin: Is your memory now refreshed, Mr. Kilduff, as to the amount that you paid to Mr. Flannagan in addition to the check that you gave him on the 25th day of June of 1943?

Q. Well, just what it says there. A. Tell us.

Mr. Katz: Just a moment, if the Court please. I will object to what it says on the paper.

The Court: Yes, that will go out, gentlemen. You disregard it.

Q. By Mr. Tolin: Tell us how much you paid him over and above the amount of the check that you gave him on the 25th day of June.

Mr. Katz: Objected to, if the Court please; incompetent, irrelevant and immaterial. It has already been asked and answered.

The Court: Overruled.

Mr. Katz: Exception noted.

The Witness: \$39.48

to which ruling the Defendant duly excepted.

The subject matter of these two assignments is inter-related and will be dealt with in a single argument for the sake of clarity and brevity.

During the course of the trial, James Kilduff was called by the Government to support the allegation contained in Count X of the Information [Tr. of R. pp. 141 to 165].

James Kilduff is mentioned in Count X of the Information and described as the operator of a market in Anaheim, California. It is alleged in Count X that the defendant (Appellant), on the 25th of June, 1943, sold and delivered to the said Kilduff a side of U. S. Grade "A" beef, weighing 564 pounds for the price of 29¼¢ per pound [Tr. of R. pp. 13 and 14].

The evidence and testimony involved in this particular point here raised appears in the Transcript of Record, pp. 145, 146, 155, 156, 159 and 160. It reads as follows:

"* * * I saw him on the next day, that is on the 25th day of June of this year at my market, he just brought the beef in. I received an invoice, Government's Exhibit No. 2, for identification, from him at that time; I also received from him the items that

are listed on that invoice. He carried the items into my place of business. I paid him the amount that appears on that invoice. Government's Exhibit No. 3, for identification, is the check on that invoice. After I wrote the check, Government's Exhibit No. 3, for identification, I gave it to Mr. Flannagan. As to whether I gave him anything else at that time my answer is that I gave him some money. There was nothing said by him or by me as to the sum that I gave him at that time. I gave him Government's Exhibit No. 3, for identification. He did not do any calculating in my presence; the way I determined how much money to give him other than the amount that appears on the check was that he told me how much. I do not remember the amount of money nor the approximate amount of money. I don't remember how it figured out in money. Mr. Flannagan did not give me any memorandum at the time. No one else was present. Government's Exhibit No. 3, for identification, was offered, and received in evidence." [Tr. of R. pp. 145 and 146.]

.

"I had a conversation with someone from the Office of Price Administration on or about the 28th of June, this year.

'Q. At that time did you give a statement to that person? A. Yes.

Mr. Katz: Objected to, if the Court please.. It is incompetent, irrelevant and immaterial and calls for hearsay, matters that have no bearing on any issue in this case, if the Court please.

Mr. Tolin: May I explain, Your Honor? It is a preliminary question.

The Court: Very well. Overruled.

Q. By Mr. Tolin: Mr. Kilduff, I am showing you now a two-page memorandum of some sort written in ink on yellow paper. Will you look that over and see if it refreshes your memory on any subject that I have asked you about here this morning?

Mr. Katz: If the Court please, I am going to object to that as incompetent, irrelevant and immaterial; that counsel cannot impeach his own witness. This witness is a Government's witness. It is leading and suggestive. I know that it is proper, if the Court please, for a witness to refresh his memory if he cannot recall an independent fact; but to utilize this method of impeaching—and that is what it amounts to—one's own witness, I think it is improper, and I make my motion on that ground, if the Court please.

The Court: May I see that? I don't know what it is.

Mr. Katz: I haven't seen it either.

The Court: Show it to counsel.

Mr. Tolin: Let me say the purpose is not impeachment, but to refresh his memory.

Your Honor, would it be, perhaps, appropriate to have it marked for identification? And I will take it from the file which contains other matters.

The Clerk: Government's Exhibit 6, for identification.' " [Tr. of R. pp. 155 and 156.]

.

" "The Court: The Court has inspected the document. Is there a question pending?

(The question was read.)

The Court: Overruled.

Mr. Katz: May I take the witness on voir dire with respect to making that memorandum?

The Court: No, there is nothing yet to take him on, Mr. Katz. There is nothing before the jury so far as that is concerned, excepting his statement that it does refresh his recollection.

Q. By Mr. Tolin: For the purpose of the record I now show this to you again, and it is now marked as Exhibit 6, for identification. Did you answer the question, Mr. Kilduff? Will you do so?

Mr. Tolin: Will you read, it Mr. Reporter, so he will have it?

(The question was re-read.)

The Court: When you have done so, answer the question categorically, Mr. Kilduff, yes or no.

The Witness: Yes.

Q. By Mr. Tolin: Is your memory now refreshed, Mr. Kilduff, as to the amount that you paid to Mr. Flannagan in addition to the check that you gave him on the 25th day of June of 1943? A. Well, just what it says there.

Q. Tell us.

Mr. Katz: Just a moment, if the Court please. I will object to what it says on the paper.

The Court: Yes, that will go out, gentlemen. You disregard it.

Q. By Mr. Tolin: Tell us how much you paid him over and above the amount of the check that you gave him on the 25th of June.

Mr. Katz: Objected to, if the Court please: incompetent, irrelevant and immaterial. It has already been asked and answered.

The Court: Overruled.

Mr. Katz: Exception noted.

The Witness: \$39.48.''' [Tr. of R. pp. 159 and 160.]

A photographic copy of the written memorandum used [Government's Exhibit No. 6, for identification] is set forth at pp. 157 and 158 of the Transcript of Record.

On cross-examination it is pertinent to note that the record reflects the further following testimony was given by the Witness Kilduff on the subject of his recollection.

"* * * I paid for that shipment of June 25 by the check which is marked as Government's Exhibit No. 3. When Mr. Flannagan presented me with the invoice I wrote out the check for the amount shown on the invoice and handed it to Mr. Flannagan. At that time I handed Mr. Flannagan the other consideration but I don't recall the amount; I can't recall the amount that long ago. I don't know whether the additional amount was for any particular item on the invoice. I don't know what it was for." [Tr. of R. p. 163.]

.

"'Q. When you read it [Government's Exhibit 6 for identification] Mr. Kilduff, you merely read the figures shown on that statement, is that right? A. That's right.'" [Tr. of R. p. 165.]

"'And even after reading this statement you do not at this time know what the amounts were you state that you gave Mr. Flannagan? A. Well there was two of them there, and I don't remember just what they were, no, sir.

Q. You still don't remember? A. No, sir.'" [Tr. of R. pp. 164 and 165.]

Assignments of Error Numbers VI and VIII relate to the use of the memorandum [Government's Exhibit No. 6, for identification] for the asserted refreshment of Kilduff's recollection as to the amount of overage he as-

sportedly paid Appellant for a side of beef on June 25, 1943.

The trial of the action commenced on November 9, 1943, and was concluded on November 11, 1943 [Tr. of R. pp. 64 to 69].

It is the contention of Appellant under these Assignments of Error that the proper foundation was not laid for the use of this memorandum; that because this proper foundation was lacking the testimony based upon the memorandum was incompetent and should not have been admitted.

The principle underlying the use of a memorandum is clearly set forth in the decision of the court in *Achlen's Executors v. Hickman*, 63 Alabama 498. It reads as follows:

“The law recognizes the right of a witness to consult memoranda in aid of his recollection under two conditions: First, when after examining a memorandum made by himself, or known and recognized by him as stating the facts truly, his memory is thereby so refreshed that he can testify, as a matter of independent recollection, to facts pertinent to the issue. In cases of this class the witness testifies to what he asserts are facts within his own knowledge, and the only distinguishing difference between testimony thus given, and ordinary evidence of facts, is that the witness, by invoking the assistance of the memorandum, admits that without such assistance his recollection of the transaction he testifies to had become more or less obscured. . . . In the second class are embraced cases in which the witness after examining the memorandum cannot testify to an existing knowledge of the fact, independent of the

memorandum,—in other words, cases in which the memorandum fails to refresh and revive the recollection and thus constitute it present knowledge. . . . (If the witness) testify that at or about the time the memorandum was made he knew its contents and knew them to be true, this legalizes and lets in both the testimony of the witness and the memorandum. The two are the equivalent of a present, positive statement of the witness, affirming the truth of the contents of the memorandum.”

It is apparent that the rule upon the subject of the use of memorandums embraces two classes of cases: first, where the witness, after referring to the paper speaks from his own memory and depends upon his own recollection as to the facts testified to; and second, where he relies upon the paper and testifies only because he finds facts contained therein.

In *State v. Easter*, 185 Ia. 476, 170 N. W. 748, it is declared:

“One called to testify as to the existence or non-existence of a fact may be able to recall the fact by an effort of memory, and state the fact truthfully as of memory. He is then competent to testify as to what the fact actually is. He may be called as a witness to testify to a material fact, and, when called, may not be able to recall the fact; yet his memory may be refreshed by an examination of some instruments submitted to him. If then he is able to speak to the existence of the fact—independent of the memorandum—as of his own personal recollection, he is competent, and is permitted to testify. This is because his mind, by the refreshing influence of the memorandum, is able to recall its existence, and he

then speaks to its existence as of his independent recollection, refreshed by the instruments. This does not make the instrument competent to speak, but, by its operation on the mind of the witness, the mind becomes repossessed of the fact, and the witness is able to speak to the fact through power of recollection.

“One may be called as a witness who cannot recall the matter about which he is called to testify. He may not be able to refresh his memory so that he is repossessed of the fact, but it may be made to appear that at some time in the past he had a personal knowledge of the fact, and made a record of it. If then he is able to say that he made the entry, or caused it to be made, and at the time it was his purpose or duty to record the fact as it then existed, the record becomes a competent witness, not because it is a record of an event, but because it speaks the past knowledge of a witness to a fact occurring within the knowledge of the witness, truthfully recorded.”

It is apparent here from a review of the testimony of the Government Witness Kilduff, he was not asked and did not say Government's Exhibit No. 6, for identification, was known or recognized by him as a true recording of the facts recited therein. The record in the instant case is barren of any evidence which would tend to establish this memorandum had an attribute of correctness or authenticity. It was purely at its best a hearsay proposition in so far as Appellant was concerned.

It is also apparent from a fair appraisal of the testimony of Kilduff that an inspection of the document could

not refresh his recollection as to the price overage the witness assertedly paid the Appellant on the 25th day of June, 1943. As Kilduff's testimony related to the transaction of June 25, 1943, he could only relate and only testified as to the figures appearing on the "yellow paper." shown to him. We quote the record:

"Q. By Mr. Tolin: Is your memory now refreshed, Mr. Kilduff, as to the amount that you paid to Mr. Flannagan in addition to the check that you gave him on the 25th day of June of 1943? A. Well, just what it says there.

Q. Tell us.

Mr. Katz: Just a moment, if the Court please. I will object to what it says on the paper.

The Court: Yes, that will go out, gentlemen. You disregard it.

(Testimony of James Kilduff.)

Q. By Mr. Tolin: Tell us how much you paid him over and above the amount of the check that you gave him on the 25th of June.

Mr. Katz: Objected to, if the Court please; incompetent, irrelevant and immaterial. It has already been asked and answered.

The Court: Overruled.

Mr. Katz: Exception noted.

The Witness: \$39.48." [Tr. of R. pp. 159 and 160.]

Under the circumstances, the rules of evidence required in view of the fact that Kilduff could not testify inde-

pendent of the memorandum, the proper foundation be established for use of the memorandum as speaking the past knowledge of the witness to a fact occurring within the knowledge of the witness, truthfully recorded.

Achlen Executors v. Hickman, 63 Ala. 498;

State v. Easter, 185 Ia. 476;

Kinney v. State, 49 Ariz. 201, 65 Pac. (2d) p. 1141 at 1149.

No such foundation as required was adduced in connection with the use of the written statement [Government's Exhibit No. 6 for identification]. Therefore, the testimony relating to and based upon the memorandum was incompetent and the objection of the Appellant to the introduction of such testimony should have been sustained, as was said in *Jewett v. United States*, 15 Fed. (2d) 955 (9th Circuit 1926):

"It is one thing to awaken a slumbering recollection of an event, but quite another to use a memorandum of a recollection, fresh when it was correctly recorded, but presently beyond the power of the witness so to restore that it will exist apart from the record."

The importance of the error of the trial judge in overruling the objection and in allowing the witness to so testify is greatly magnified by the relative importance of the incompetent evidence so adduced in the case at bar. Because of the peculiar circumstances of this case the errors herein assigned and complained of are sufficient to entitle this Appellant to a reversal.

POINT III.

The Court's Instruction on Specific Intent Is Erroneous for the Reason That It Is Inconsistent and Contradictory (Assignment of Error No. XX).

ASSIGNMENT OF ERROR No. 20.

The court erred in giving to the jury the following instruction offered by the government and that this portion of the court's charge was duly excepted to by the defendant in the manner and within the time prescribed by law.

PLAINTIFF'S INSTRUCTION No. 14.

This is an offense requiring a specific intent, and such intent must be shown to exist beyond a reasonable doubt. The intent on the part of the defendant may be shown by his acts and declarations and by the circumstances surrounding his actions which, when taken together, must prove beyond a reasonable doubt that the defendant had the specific intent to wilfully sell and deliver meat at a price or prices in excess of the lawful price or prices.

If you are convinced beyond a reasonable doubt that the defendant did in fact sell meat to any one, or more of the persons named in the several counts of the Information, and that he did in fact charge a price or prices for such meat in excess of the prices I have read to you, and that he at such time or times intended to so sell such meat at a higher price or prices than permitted by the Maximum Price Regulations promulgated under

the Emergency Price Control Act of 1942, then you will find that he did so with a specific intent.

Instruction No. 14

Given as Requested: ✓

Given as Modified:

Refused:

United States District Judge.

[Tr. of R. pp. 103 and 104.]

In order to sustain a conviction of the offense charged the evidence must show and the jury impliedly find that Appellant had a specific intent to violate the act or regulation. The first paragraph of the questioned instruction announces the law relative to specific intent. The concluding paragraph, however, is clearly erroneous, which portion reads as follows:

“If you are convinced beyond a reasonable doubt that the defendant did in fact sell meat to any one, or more of the persons named in the several counts of the Information, and that he did in fact charge a price or prices for such meat in excess of the prices I have read to you, and that he at such time or times intended to so sell such meat at a higher price or prices than permitted by the Maximum Price Regulations promulgated under the Emergency Price Control Act of 1942, then you will find that he did so with a specific intent.

Instruction No. 14

Given as Requested: ✓

Given as Modified:

Refused:

United States District Judge.”

The Jury is told that if Appellant (1) sold the meat, (2) at a price in excess of that announced by the court as the ceiling price, and (3) that he intended to sell at a price higher than permitted by the regulation and act, then, they, the Jury, should find "he did so with a specific intent." Appellant could have done all of the things stated in that portion of the instruction and with the intent, as announced therein, and still not have done so with intent to violate the rule.

Intent being an essential element of the offense charged it was highly important that the Jury be properly instructed in this connection.

The situation herein is the same as where two instructions conflict, and the fact that one is proper does not correct error in the giving of the other.

The question of conflicting instructions arose in the case of *People v. Bartnett*, 15 Cal. App. 89, 113 Pac. 879, and a conviction was reversed because of the giving of conflicting instructions. Quoting from the opinion:

"* * * When the instructions on a material point are contradictory, there should be a new trial. *People v. Anderson*, 44 Cal. 65; *People v. Valencia*, 43 Cal. 552; *People v. Bush*, 65 Cal. 129, 3 Pac. 590; *People v. Marshall*, 112 Cal. 422, 44 Pac. 718; *Estate of Calef*, 139 Cal. 673, 73 Pac. 539."

Appellant concedes there are exceptions where the giving of conflicting instructions do not constitute reversible error. We do contend, however, in the instant case for the reasons hereinabove stated, it cannot be said that the Jury would have convicted had they been properly instructed relative to specific intent.

Conclusion.

Appellant submits that this court should reverse the conviction of Appellant upon any one or all of the grounds hereinabove asserted.

Respectfully submitted,

CANTILLON & GLOVER,

Attorneys for Appellant.

No. 10629.

IN THE
United States Circuit Court of Appeals
FOR THE NINTH CIRCUIT

CLARENCE O. FLANNAGAN,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPELLEE'S BRIEF.

CHARLES H. CARR,

United States Attorney,

JAMES M. CARTER,

Assistant United States Attorney,

ERNEST A. TOLIN,

Assistant United States Attorney,

United States Postoffice and
Courthouse Bldg., Los Angeles (12),

Attorneys for Appellee.

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PAUL P. O'BRIEN,
CLERK

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No. 10629.

IN THE

United States Circuit Court of Appeals
FOR THE NINTH CIRCUIT

CLARENCE O. FLANNAGAN,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPELLEE'S BRIEF.

Jurisdictional Statement.

The United States District Court for the Southern District of California had jurisdiction of appellant and the subject matter and this Court has jurisdiction of the appeal.

A. The offense charged was a violation, within the Southern District of California, of The Emergency Price Control Act of 1942, Pub. L. 421, 77th Cong. 2nd Sess., 56 Stat. 23, January 30, 1942 (50 U. S. C. App. 901-942) by violating Revised Maximum Price Regulation 169 (7 Fed. Reg. 10381) as amended. Under the provisions of said Act, said Court had jurisdiction to try the case.

B. This Court has jurisdiction of the appeal under the provisions of Section 225(a) and (d) of Title 28, United States Code.

Statement of the Case.

By leave of Court an Amended Information was filed herein on October 11, 1943 [R. p. 22]. Trial was had and defendant was convicted by a jury on November 11, 1943 [R. p. 69]. The conviction was as to Count Ten which appears at page 32 of the transcript. On November 30, 1943, defendant was sentenced to serve six months in jail and pay a fine of \$1,000, execution of the term of imprisonment was suspended for one year and defendant placed on probation for that period of time. The fine was deposited in the registry and on December 4, 1943 defendant appealed. Although based upon several assignments of error, appellant's first point is in substance that the allegations of Count X of the Amended Information do not state facts sufficient to constitute a criminal offense. His second point in substance is that the trial court erred in allowing the witness Kilduff to examine Government's Exhibit No. 6 for the purpose of refreshing his memory. His third point is that the jury was improperly instructed on specific intent. These points will be dealt with in the order presented by appellant.

Questions Involved in Appeal.

The legal issues involved in the appeal are as follows:

1. Does the information state a criminal offense?
2. May a witness, for the purpose of memory refreshment, while on the witness stand, consult a memorandum made by another person and subscribed by the witness?
3. Did the court sufficiently instruct the jury on the quality and type of intent involved in the offense charged?

Summary of the Evidence.

The summary of the evidence set forth in appellant's opening brief is an approximately accurate digest of the matters there printed and for that reason it is not appropriate to repeat. However, certain evidence introduced at the trial has been omitted from appellant's summary or incompletely stated and appellee therefore submits the following additional summary of evidence.

I.

Use of Government's Exhibit No. 6, for Identification, to Refresh the Memory of the Witness Kilduff and the Evidence Given Following Reference to the Exhibit.

[R. p. 155.] Kilduff testified that he had a conversation with some one from the Office of Price Administration on or about June 28, 1943. He was then shown a two page memorandum which was marked Government's Exhibit No. 6, for identification [R. pp. 157 and 158] and the following question was propounded. " 'Will you look that over and see if it refreshes your memory on any subject I have asked you about here this morning?' " He answered, " 'Yes.' " [R. p. 159].

Q. 'Is your memory now refreshed, Mr. Kilduff, as to the amount you paid to Mr. Flanagan in addition to the check that you gave him on the 25th day of June of 1943?' A. 'Well, just what it says there.'

Q. 'Tell us.'

Mr. Katz: 'Just a moment, if the Court please. I will object to what it says on the paper.'

The Court: 'Yes, that will go out gentlemen. You disregard it.'

Q. By Mr. Tolin: 'Tell us how much you paid him over and above the amount of the check that you gave him on the 25th of June.'

Mr. Katz: 'Objected to, if the Court please; incompetent, irrelevant and immaterial. It has already been asked and answered.'

The Court: 'Overruled.'

Mr. Katz: 'Exception noted.'

The Witness: '\$39.48.'

Q. By Mr. Tolin: 'Is your memory now refreshed, Mr. Kilduff, as to the amount you paid him on the 28th day of June, 1943, over and above the amount of the check?' A. 'It is on there. \$29.75.'

Mr. Katz: 'Just a minute, if the Court please. I will move to strike for the purpose of the objection.'

The Court: 'That may go out. Disregard it, gentlemen.'

Q. By Mr. Tolin: 'Mr. Kilduff, is your memory now refreshed as to the amount that you paid over and above the amount of the check on the 28th of June, 1943? Please tell us yes or no.' A. 'Yes.'

Q. 'What amount did you pay over and above the amount of the check on that date; that is to say, on the 28th day of June, 1943?' A. '\$29.75.'

Q. 'What is this that I have shown you here, Exhibit 6, for identification?' A. 'The statement that I gave on that day.'

Q. 'To whom?'

Mr. Katz: 'Objected to, if the Court please; incompetent, irrelevant and immaterial. The statement is hearsay.'

The Court: 'Sustained.'

Q. By Mr. Tolin: 'What was the date on which you gave this statement?' A. '28th of June.'

On cross-examination the following occurred [Tr. of R. p. 163]:

“* * * ‘I paid for that shipment of June 25 by the check which is marked as Government’s Exhibit No. 3. When Mr. Flannagan presented me with the invoice I wrote out the check for the amount shown on the invoice and handed it to Mr. Flannagan. At that time I handed Mr. Flannagan the other consideration but I don’t recall the amount; I can’t recall the amount that long ago. I don’t know whether the additional amount was for any particular item on the invoice. I don’t know what it was for.’ * * *” [Tr. of R. pp. 164 and 165.]

“Q. ‘Now, Mr. Kilduff, you were shown a statement to refresh your recollection, and then made certain statements after having read it. Isn’t it true that your testimony with reference to the amounts that you then gave were given entirely from the memorandum, that you had no recollection of those amounts?’ A. ‘The only recollection I have is how much a pound it was. I don’t have how much it figured out. I have the round figure in my mind of how much a pound it was on the beef.’

Q. ‘And even after reading this statement you do not at this time know what the amounts were that you state that you gave Mr. Flannagan?’ A. ‘Well, there was two of them there, and I don’t remember just what they were, no, sir.’

Q. ‘You still don’t remember?’ A. ‘No, sir.’

Q. ‘And the statement that Mr. Tolin showed you did not refresh your recollection as to what

those amounts were?' A. 'Well, they did when I read it. But I can't remember them right now. I remember the 7 cents.'

Q. 'When you read it, Mr. Kilduff, you merely read the figures shown on the statement, is that right?' A. 'That's right.' "

Prior to being shown Government's Exhibit No. 6, for identification, the witness had testified concerning the amount of the overcharges as follows [Tr. of R. p. 142]:

" 'He (appellant) said that he heard I wanted some meat and said he could supply me a little but probably not all I needed and said there was an overage. He did not tell what it was for.' "

It was at that time that the invoice, Government's Exhibit No. 1, for identification, was given Kilduff. He testified about it as follows:

" 'I received the meat that is listed on the invoice. I paid Mr. Flannagan the price that appears on that invoice. There wasn't much anything said, only he told me how much other in cash I owed, that was for him. I don't remember how much I gave him on that invoice but it figured out about 7¢ a pound on the beef.' "

[Tr. of R. p. 146.] Concerning the June 25, 1943, transaction the witness testified:

" 'After I wrote the check, Government's Exhibit No. 3, for identification, I gave it to Mr. Flannagan. As to whether I gave him anything else at that time

my answer is that I gave him some money. There was nothing said by him or by me as to the sum that I gave him at that time. I gave him Government's Exhibit No. 3, for identification. He did not do any calculating in my presence; the way I determined how much money to give him other than the amount that appears on the check was that he told me how much. I do not remember the amount of money nor the approximate amount of money. I don't remember how it figured out in money.'
* * *."

On cross-examination the witness testified [Tr. of R. pp. 162 and 163]:

"* * * 'We did not discuss the individual prices of the items listed on the invoice. I paid the invoice of June 24, Government's Exhibit No. 1. As to whether the check was for the sum of \$138.25, my answer is that it was. That is the amount that is the total of the items, that is shown on the invoice of June 24. At the time Mr. Flannagan received the check he marked the invoice paid and handed it back to me. As to whether I recall in addition to giving Mr. Flannagan the check whether I gave him any cash or other consideration, my answer is yes. I recall it from my own recollection and memory. I don't know how much it was. I have no way of knowing what it was, except my recollection.'
* * *."

II.

Evidence Re Counts 8 and 9.

[R. pp. 166 and 168.] Roland H. Richards testified that he operated a retail meat market in Anaheim, California, during June and July, 1943, that he had a conversation with appellant at the witness' market in which the appellant said:

“ ‘I understand you are short of beef.’ I said, ‘Am I short of beef? I sure am. I just can’t get any meats at all. I sure would like to satisfy these people here. I have been in business here a long time, and anything you can do for me I sure would appreciate it.’ He said, ‘Well, I can let you have meat, but it is going to cost you a little overage.’ I said, ‘What do you mean by that, Mr. Flannagan?’ He said, ‘Well, I will have to select your beef and I will have to truck it down here for you and, of course, that is going to cost some overage.’ I didn’t ask him the amount or anything like that. I said ‘O. K.’ ‘I will be glad to have the beef.’ ”

The witness wasn’t present when the meat was delivered and did not recall whether he ever paid appellant any excess money for the first meat that was delivered pursuant to the conversation. The next week appellant again came to the witness’ market, made a delivery and presented an invoice which the witness paid. The witness stated he paid appellant some overcharge down through the first time they dealt.

[R. p. 183.] Louis M. Pickel testified that appellant had been one of his regular suppliers of meat for seven years and that Pickel operated a retail meat market at Anaheim, California. Sometime prior to the first of July, 1943, at Mr. Pickel’s market appellant told him that

meat was getting hard to get and under the circumstances it would cost more and that Pickel would have to pay more for it. He told Pickel how much more, but Pickel could not remember the amount but recalled that he told appellant that he guessed it was the only way out and he guessed it would have to be all right. On the first of July, 1943, appellant delivered some meat to Pickel's market at which time he also gave Pickel an invoice, Government's Exhibit No. 7 [R. p. 188]. At the same time he gave him a piece of paper and told him that the amount thereon was what was owed appellant. To the best of Pickel's recollection he did not then owe appellant for any meat other than the meat described on the invoice, Government's Exhibit No. 7. Said slip of paper, Government's Exhibit No. 8, for identification, was what appellant gave the witness for collection that day. It was what he was collecting for meat on the invoice, Government's Exhibit No. 7, appellant wrote the figures on Government's Exhibit No. 8, for identification, which are in pencil. When Government's Exhibit No. 8, for identification, was handed to witness by appellant, Pickel paid appellant \$52.77 [R. p. 186], at which time appellant said to Pickel, " 'That is how much you owe me today ' " Pickel paid \$52.77. Appellant accepted it and wrote " 'Paid \$38.93' " on the invoice, Government's Exhibit No. 8.

The Court ruled that Government's Exhibit No. 8, for identification, should not be handed to the jury, but that the part of it which was written in pencil could be read to the jury. The portion in pencil was read as follows: " '5 2 7 7.' "

ARGUMENT.

I.

The Court Did Not Err in Overruling the Demurrer and in Denying a Directed Verdict.

Appellant's Point I as argued in his brief is limited to two challenges to the sufficiency of the Amended Information which is claimed to be insufficient because it fails to allege:

- (1) The status of appellant—that is, the particular type of seller appellant was at the time of the alleged sale; and
- (2) The manner in which the alleged ceiling price was arrived at by the Government. (In his brief at page 16 appellant refers to the ceiling price as $27\frac{1}{4}\phi$ per pound. Elsewhere in the record, and brief the ceiling price is always mentioned as $22\frac{1}{4}\phi$ per pound.)

This argument is specious because the offense charged is one which any person may commit. It is complained that appellant could not tell from the information whether he was a "wholesaler," "peddler truck seller," "independent wholesaler," "hotel supply house," "slaughter" or "packer."

As no one was permitted by law to sell a beef carcass or side at $29\frac{1}{4}\phi$ per pound, the particular classification in business of defendant could not be an element of the crime, nor could the Government have pleaded itself out of a case by undertaking to catalogue the appellant within any of the several classifications defined in the regulation.

Likewise, as there is no formula by which the price of a Grade A beef carcass or side could be computed to be

29¼¢ per pound, the manner in which the Government arrived at a particular computation of the ceiling price is not material for the highest price computable under the regulation was less than 29¼¢ per pound.

This theory of pleading has been approved in *United States v. Charney*, 50 F. Supp. 581 (Dist. Ct. Mass. 1942), which concerned a prosecution for violation of the same regulation involved in this case.

See, also:

Taylor v. United States, 142 Fed. (2d) 808 (9th Circuit, April 26, 1944).

The opinion in *Cohen v. United States*, 294 Fed. 488, contains apt language on the sufficiency of a criminal pleading.

“The sufficiency of the indictment, especially after conviction, is no longer tested by the nicety of expression once required. If by fair and reasonable construction, it alleges every essential element to make out the crime, it is sufficient.”

The case of *Burton v. United States*, 202 U. S. 344, 60 L. Ed. 1057, also states the rule.

“The averments of the indictment were sufficient to enable the defendant to prepare his defense, and in the event of acquittal or conviction the judgment could have been pleaded in bar of a second prosecution for the same offense. The accused was not entitled to more, nor could he demand that the special or particular means employed in the commission of the offense should be more fully set out in the indictment. The words of the indictment directly and without ambiguity disclosed all the elements essential to the commission of the offense charged, and, therefore,

within the meaning of the Constitution and according to the rules of pleading, the defendant was informed of the nature and cause of the accusation against him."

There is no substance in appellant's claim of bewilderment at the information for he was able to and did testify in his defense that the ceiling price was as the Government had pleaded it to be; and placed his hope of acquittal on the claim that he had charged only that price, and not the price of 29¼¢ per pound which the Amended Information accused him of receiving. The case turned, not on the classification of appellant as a "peddler truck seller" but on the conflicting testimony as to whether he had invoiced at a price pleaded as the ceiling price, and clandestinely collected a price that, for Grade A beef in the form he sold it, was above the ceiling for all classes of purveyors of a Grade A beef carcass or half.

The testimony of appellant on this subject is as follows [R. p. 201]:

"To the best of my knowledge the prices on Government's Exhibit No. 1 were the ceiling price the West Coast Meat Company was allowed to charge for that day. It is true that the other invoices that have been shown here this morning are the ceiling price, including the extra because of the zone and the delivery charge."

The Amended Information performed its function of notifying the appellant of the nature of the charge. He was told that the price which at the trial he was willing to admit as his ostensible price was not disputed. The price mentioned in the pleading which was the important one to plead was the price at which the sale was alleged

to have been made, for it was the charging of that price which was an element of the offense, and if that price was charged, regardless of the classification of the vendor, then there was a sale at a higher price than permitted for no person was allowed to charge such a price. The language of prohibition in the regulation involved reads as follows (Revised Maximum Price Regulation 169, Section 1364.401):

“* * * no person shall sell or deliver any beef carcass or beef wholesale cut, and no person shall buy or receive any beef carcass or beef wholesale cut at a price higher than the maximum price permitted by 1394.451; and no person shall agree, offer, solicit or attempt to do any of the foregoing.”

II.

There Was No Error in Allowing the Witness Kilduff to Examine Government's Exhibit No. 6, for Identification, for the Purpose of Refreshing His Memory.

The attack on the use of the memorandum [Government's Exhibit No. 6, for identification, R. p. 156] is based upon objections to the admission of testimony. There was no motion to strike the testimony, except certain motions to strike portions thereof, which motions were granted. There was no objection to the use of the document for memory refreshment. The first objection is set forth on page 155 of the transcript of record.

“Q. By Mr. Tolin: ‘Mr. Kilduff, I am showing you now a two-page memorandum of some sort written in ink on yellow paper. Will you look that over and see if it refreshes your memory on any subject that I have asked you about here this morning?’

Mr. Katz: 'If the Court please, I am going to object to that as incompetent, irrelevant and immaterial; that counsel cannot impeach his own witness. This witness is a Government's witness. It is leading and suggestive. I know that it is proper, if the Court please, for a witness to refresh his memory if he cannot recall an independent fact; but to utilize this method of impeaching—and that is what it amounts to—one's own witness, I think it is improper, and I make my motion on that ground, if the Court please.'

Mr. Tolin: 'Let me say the purpose is not impeachment, but to refresh his memory.' "

In answer to a question propounded as to whether his memory was refreshed as to the amount he paid to appellant in addition to the check given on the 25th day of June, 1943, the witness gave an ambiguous answer [R. p. 159]: " 'Well, just what it says there.' " It is impossible to tell from the answer whether the witness was stating that his memory was refreshed or whether he then relied upon the document. The Court struck the answer, although the answer did not state the amount of money paid. The witness had immediately before stated that his memory was refreshed by reference to the document [R. p. 159]: " 'Well, just what it says there.' " He was then asked [R. p. 160]:

"Q. By Mr. Tolin: 'Tell us how much you paid him over and above the amount of the check that you gave him on the 25th of June.'

Mr. Katz: 'Objected to, if the Court please; incompetent, irrelevant and immaterial. It has already been asked and answered.'

The Court: 'Overruled.'

Mr. Katz: 'Exception noted.'

A. '\$39.48.'

Q. By Mr. Tolin: 'Is your memory now refreshed, Mr. Kilduff, as to the amount you paid him on the 28th day of June, 1943, over and above the amount of the check?' A. 'It is on there. \$29.75.'

Mr. Katz: 'Just a minute, if the Court please. I will move to strike for the purpose of the objection.'

The Court: 'That may go out. Disregard it, gentlemen.'

Q. By Mr. Tolin: 'Mr. Kilduff, is your memory now refreshed as to the amount that you paid over and above the amount of the check on the 28th of June, 1943? Please tell us yes or no.' A. 'Yes.'

Q. 'What amount did you pay over and above the amount of the check on that date; that is to say, on the 28th day of June, 1943?' A. '\$29.75.'

Q. 'What is this that I have shown you here, Exhibit 6, for identification?' A. 'The statement that I gave on that day.'

Q. 'To whom?'

Mr. Katz: 'Objected to, if the Court please; incompetent, irrelevant and immaterial. The statement is hearsay.'

The Court: 'Sustained.'

Q. By Mr. Tolin: 'What was the date on which you gave this statement?' A. '28th of June.' "

The Court had before it at the time it admitted the testimony of the witness after reference to the document the following direct statement of the witness that his memory was presently refreshed so that the Court properly concluded that the witness was not testifying from a past recollection recorded but from a present recollection revived. " 'Will you look that over and see if it refreshes

your memory on any subject I have asked you about here this morning?’ ” [R. p. 155.] Answer: “ ‘Yes.’ ”

“Q. By Mr. Tolin: ‘Tell us how much you paid him over and above the amount of the check that you gave him on the 25th of June’ * * * A. ‘\$39.48’ * * *

Q. By Mr Tolin: ‘Mr. Kilduff, is your memory now refreshed as to the amount you paid over and above the amount of the check on the 28th of June, 1943? Please tell us yes or no.’ A. ‘Yes.’

Q. ‘What amount did you pay over and above the amount of the check on that date; that is to say, on the 28th of June, 1943?’ A. ‘\$29.75.’ ” [R. p. 160.]

It is then related that Government’s Exhibit No. 6, for identification, which the witness had before him was a statement which he gave on June 28, 1943.

It might be argued that the requirements were met for using the document as a record of past recollection recorded, however, its use was clearly limited to stimulating a present recollection revived. There was no objection made other than the general objection that the questions were incompetent, irrelevant and immaterial and that the question had already been asked and answered. There was no objection to the witness having access to the document.

If the foundation for use of the document on the basis of its being a record of past recollection was inadequate there was nothing in the objections to direct the Court or counsel’s attention to the inadequacy of the foundation so that it could be strengthened. As to the document’s use to stimulate a present recollection, all of the tests of the authorities have clearly been met.

Wigmore on Evidence, Third Edition, Sec. 758.

“The purpose being to allow the legitimate use of written aids, while preventing their misuse, it would seem that no hard-and-fast rules can be laid down for invariable application. That which is suspicious and reprehensible in one instance may be entirely trustworthy in the next. No unerring markers of impropriety can be named absolutely.

“It follows, therefore, that any writing whatever is eligible for use, while, on the other hand, any writing whatever may, in the circumstances, become improper. This has been well put in the following passage:

“1835. Sir G. A. Lewin, Note to *Lawes v. Reed*, 2 Lew. Cr. C. 152: ‘Where the object is to revive in the mind of the witness the recollection of the facts of which he once had knowledge, it is difficult to understand why any means should be excepted to whereby that object may be obtained. Whether in any particular case the witness’ memory has been refreshed by the document referred to, or he speaks from what the document tells him, is a question of fact open to observation, more or less according to the circumstances. If in truth the memory has been refreshed, and he is unable in consequence to speak to facts with which he was once familiar, but which afterwards escaped him it cannot signify, in effect, in what manner or by what means these facts were recalled to his recollection. Common experience tells every man that a very slight circumstance, and one not in point to the existing inquiry, will sometimes revive the history of a transaction made up of many circumstances . . . Why, then, if a man may refresh his memory by such means out of court, should he be precluded from doing so when he is under examination in court?’

“It is worth while, therefore, to note that none of the limiting rules just examined for past recorded recollection have any bearing on the present subject.

* * *

Jewett v. United States, 15 F. (2d) 955, 956 (C. C. A. 9th, 1926).

“It is one thing to awaken a slumbering recollection, of an event, but quite another to use a memorandum of a recollection, fresh when it was correctly recorded, but presently beyond the power of the witness so to restore that it will exist apart from the record. In the former case it is quite immaterial by what means the memory is quickened; it may be a song, or a face, or a newspaper item, or a writing of some character. It is sufficient that by some mental operation, however mysterious, the memory is stimulated to recall the event, for when so set in motion it functions quite independently of the actuating cause.”

To the same effect are the following cases:

McHenry v. United States, 276 Fed. 761;

Delaney v. United States, 77 Fed. (2d) 916;

Prentiss v. Chandler, 85 Fed. (2d) 733 (C. C. A. 9th, 1936).

Appellant in his brief reaches into matters developed in cross-examination in an effort to show that the memory of the witness was not revived. If this was a point at all it was one relating to weight rather than admissibility

of evidence and was for the jury. The point is also met by a consideration of the record. The matters developed on cross-examination were not before the Court when the witness had access to the document and gave the evidence complained of. At the time the witness gave his testimony he claimed to be doing so from a refreshed memory. Even his answer which was stricken, “ ‘Well, just what it says there’ ” is but a claim that the memorandum and the witness’ memory coincided. No motion to strike was made when the alleged deficiencies were developed on cross-examination. There was no ground for such an attack for all of the answers given by Kilduff on cross-examination which are relied upon by appellant as showing that his recollection was not refreshed are substantially modified by the following quotation from the Record, page 165:

“Q. ‘You still don’t remember?’ A. ‘No, sir.’

Q. ‘And the statement that Mr. Tolin showed you did not refresh your recollection as to what those amounts were?’ A. ‘Well, they did when I read it. But I can’t remember them right now. I remember the 7 cents.’ ”

The testimony by the witness after refreshing his memory by reading the memorandum was a mere summary of what he had already positively stated without aid of a memory refresher.

It was his recollection before he was shown Government’s Exhibit No. 6, for identification, that the over-

charge on the beef was at about 7¢ per pound [R. pp. 142 and 143]. “* * * ‘There wasn’t much of anything said, only he told me how much other in cash I owed, that was for him. I don’t remember how much I gave him on that invoice but it figured out about 7¢ a pound on the beef.’ ”

The extent to which the witness’ memory was refreshed and the only way in which his testimony was amplified after he had recourse to Government’s Exhibit No. 6, for identification, was to state that the amount of overcharge that he paid was \$39.48 as to the invoice involved in Count X upon which he was convicted, and \$29.75 in the invoice involved in the June 28th transaction [Count XI, R. p. 106].

Government’s Exhibit No. 2 [R. p. 150], is the invoice involved in Count X. It shows one-half ($\frac{1}{2}$) Str. 564 pounds at $22\frac{1}{4}$ cents per pound. The weight, 564 multiplied by seven cents equals \$39.48. The same formula applied to the June 28th invoice shows that seven cents a pound added to the price involved equals \$29.75.

The overcharge as pleaded, was proved by this testimony before the witness was shown the memorandum for purposes of memory refreshment. All that was accomplished by use of the memorandum could have been done equally well by the jury by a simple exercise in multiplication, based upon testimony already in the record.

III.

Instruction No. 14 Was Not Unfair to Appellant.

In giving Plaintiff's Instruction No. 14 the Court prescribed a rule more favorable to defendant than the law required.

The offense charged is not one requiring a specific intent. There is nothing in the Emergency Price Control Act of 1942 which provides that an act must be done with any specific intent in order to constitute an offense. Section 205(b) of the Act reads:

“Any person who willfully violates any provision of section 4 of this Act, and any person who makes any statement or entry false in any material respect in any document or report required to be kept or filed under section 2 or section 202, shall, upon conviction thereof, be subject to a fine of not more than \$5,000, or to imprisonment for not more than two years, in the case of a violation of section 4(c) and for not more than one year in all other cases, or to both such fine and imprisonment. * * *”

“Willfully” is discussed in *St. Joseph Stockyards Co. v. United States*, 187 Fed. 104 (C. C. A. 8th, 1911):

“* * * * ‘Willfully’ means purposely or obstinately, and is designed to describe the attitude of a carrier, who, having a free will or choice, either intentionally disregards the statute or is plainly indifferent to its requirements. * * *”

From a reading of the Instruction complained of it appears that the Court did actually instruct the jury that it was necessary in order to convict for them to believe that defendant intended to sell meat at a higher price than permitted by the Maximum Price Regulations promul-

gated under the Emergency Price Control Act of 1942. The Instruction is as follows, the italicized portion being that complained of [R. pp. 225 and 226]:

“This is an offense requiring a specific intent, and such intent must be shown to exist beyond a reasonable doubt. The intent on the part of the defendant may be shown by his acts and declarations and by the circumstances surrounding his actions which, when taken together, must prove beyond a reasonable doubt that the defendant had the specific intent to wilfully sell and deliver meat at a price or prices in excess of the lawful price or prices.

“If you are convinced beyond a reasonable doubt that the defendant did in fact sell meat to anyone, or more of the persons named in the several counts of the Information, and that he did in fact charge a price or prices for such meat in excess of the prices I have read to you, and that he at such time or times intended to so sell such meat at a higher price or prices than permitted by the Maximum Price Regulations promulgated under the Emergency Price Control Act of 1942, then you will find that he did so with a specific intent.”

It cannot be determined from the alleged exception taken at the trial just how appellant wanted the Instruction revised.

With some modification the Court gave defendant's Proposed Instruction No. 13 as follows [R. p. 225]:

“It is neither criminal nor unlawful for a person to do, or to agree to do, that which the law does not prohibit but recognizes may be lawfully done. So if you believe from the evidence in this case, or if you entertain a reasonable doubt from all the evidence that whatever act or acts was or were done by the

defendant was or were done, not with any criminal intent or not for the purpose of doing or performing any unlawful act, but, on the other hand, was or were done honestly and with an honest intent and purpose and in the belief that such act or acts was or were proper and lawful, then and in such event no crime had been committed, and if you so conclude under all of the evidence it will be your duty to find the defendant not guilty.”

To this Instruction the Court added [R. pp. 226 and 227]:

“If you find from the evidence that the defendant did not violate any of the provisions of revised maximum price regulations as alleged in the respective counts of the amended information, or if after considering all of the evidence in the case and the law as stated in the instructions of the court, there is a reasonable doubt in your mind as to whether or not the defendant intentionally violated any of the provisions of an applicable revised maximum price regulation as alleged in the amended information and as stated in the instructions of the court, you must find the defendant not guilty.”

In view of the fact that the statute in defining the crime makes “willfulness” an element, but does not add any other requirement of motive or state of mind, it appears that the Court fulfilled its duty by its treatment of willfulness in Plaintiff’s Instruction No. 14 [R. p. 225]; Defendant’s Instruction No. 13 [R. p. 225] and the Court’s own instruction above quoted. The latter instruction added the word “intentionally” to the Government’s burden of proof. A similar instruction was approved in *Zimberg v. United States*, 142 F. (2d) 132 (1st Circuit, April 24, 1944).

Appellant's Authority Distinguished.

Appellant relies upon *United States v. Johnson*, 53 Fed. Supp. 167 (Dist. Ct. of Del. 1943). Without conceding the correctness of the decision in that case, it is deemed appropriate to point out that the case is distinguishable from the present case. This case involves Revised Maximum Price Regulation 169, which concerns beef. The Regulation in *United States v. Johnson* was Regulation 269. It is necessary to go beyond the Regulation to determine the maximum price at which any of the vendors governed by the Regulation can sell poultry. The opinion includes the following:

“It is manifest from this regulation that to determine ceiling price in a given situation, one must know (a) the buyer's ‘customary receiving point’; (b) the freight charges from Chicago to the buyer's ‘customary receiving point’; (c) whether the prosecution is for an alleged violation of the retail ceiling or of the wholesale ceiling; and (d) with respect to those transactions alleged to have been ‘f. o. b.’, the freight charges from the farm to the buyers’ ‘customary receiving point’. * * * It is impossible to compute the price ceiling unless it is known whether the purchasers of the poultry were buying for reshipment to another place. It is true that defendants may have knowledge of this fact, but this is immaterial. If the government erroneously computed the ceiling price, defendants should have the opportunity to object to such error without the necessity of standing trial.

“In view of this interpretation of ‘buyer's customary receiving point’, it is neither necessary nor profitable to discuss each component part of the administrative formula. The facts concerning freight charges are available to defendants, but they are

unable to utilize this information absent an allegation of the 'buyer's customary receiving point.' In short, I cannot tell from the indictments whether a crime has been committed—even if all the facts alleged are proved at trial. This alone renders the indictments insufficient. In passing, even if I were skillful enough to give adequate instructions, I doubt what a jury would make of this business in an attempt to reach an intelligent verdict under the present allegations of the indictments.”

There is no need to take such variable factors into account in the case now before the Court.

Conclusion.

From the foregoing it is respectfully submitted by the government that the judgment of the trial court was not contrary to law and that the evidence produced at the trial of the cause was ample to support appellant's conviction upon Count X as charged in the Information.

Respectfully submitted,

CHARLES H. CARR,
United States Attorney,

JAMES M. CARTER,
Assistant United States Attorney,

ERNEST A. TOLIN,
Assistant United States Attorney,
Attorneys for Appellee.

APPENDIX A.

CALCULATION OF CEILING PRICE.

The ceiling price of a Grade A beef carcass or side is determined by Maximum Price Regulation 169, as amended by Amendment 15, promulgated June 7, 1943, and made effective as to packers on June 14, 1943, and as to other types of purveyors June 19, 1943. The following quotation is from the Regulation as published in 7 Fed. Reg. 10381, showing the price amendment published in 8 Fed. Reg. 7675.

"Sec. 1364.452 Schedule I: Beef price zones and applicable zone prices—(a) Zone 1.

(1) Zone 1 includes the following area: Washington, Oregon, California, and Nevada.

(2) Beef carcass and beef wholesale cut prices applicable in Zone 1. Subject to the provisions of paragraph (k) of this section, the Zone 1 price for each grade of each class of beef carcass and beef wholesale cut shall be the price specified therefor in paragraph (d) hereof (the applicable zone (4) price) plus \$1.75 per cwt. * * *

"(2) Beef carcass and beef wholesale cut prices applicable in Zone 4.

"Subject to the provisions of paragraph (k) the applicable zone prices for Zone 4 are as follows:

"(All prices are on dollars per hundredweight bases; the price for any fraction of a hundredweight shall be reduced accordingly.)

"Steer or Heifer	Choice or AA	Good or A	Commercial or B	Utility or C	(Bologna bulls (Equivalent cutter and can- ner grade	
					Cutter Canner or D	
(i) Beef carcass or side	\$20.00	19.00	17.00	15.00	12.50	13.00"

“Sec. 1364.454 Schedule III; Amounts which may be added to zone prices listed in Schedule I. Subject to the conditions hereinafter provided, the following may be added to the applicable zone prices: * * *

(2) For transportation from the point at which the meat was slaughtered in Price Zone 1, 2, 5, 6, 7, 8, 9, or 10 to a distribution point located in the same price zone as the slaughter point, other than another slaughter, packing or processing plant owned or controlled by the same seller, the seller may add the actual cost of transportation computed at the lowest common carrier rate for the method of transportation used, but in no event more than 25¢ per cwt.

(3) For local delivery made within a radius of 25 miles from a slaughter plant, packing house, car-route unloading point, railroad unloading station or branch house, to the place of business of a seller at retail, wholesaler (not owned or controlled by the shipper or consignor), hotel supply house (not owned or controlled by the shipper or consignor), or commercial user, or the designated delivery point of a war procurement agency, or other government agency; or

For local delivery made within a radius of 25 miles from the place of business of a wholesaler or hotel supply house, to the place of business of a seller at retail, purveyor of meals, or commercial user, or the designated delivery point of a war procurement agency, or other government agency: the seller may add 25¢ per cwt. * * *

(5) For local delivery made from a slaughter plant, packing house, car-route unloading point, railroad unloading station, or branch house, located in Price Zone 1, 2, 5, 6, 7, 8, 9, or 10, to the place of

business of a seller at retail, wholesaler (not owned or controlled by the shipper or consignor), hotel supply house (not owned or controlled by the shipper or consignor), or commercial user, or the designated delivery point of a war procurement agency, or other government agency, located more than 25 miles from such shipping point; or

For local delivery made from the place of business of a wholesaler or hotel supply house located in Price Zone 1, 2, 5, 6, 7, 8, 9, or 10, to the place of business of a seller at retail, purveyor of meals or commercial user, or the designated delivery point of war procurement agency or other government agency, located more than 25 miles from such shipping point; the seller may add the actual cost of local delivery computed at the lowest common carrier rate for the method of delivery used, but in no event more than 50¢ per cwt.

(6) Notwithstanding any of the provisions of paragraph (a) (1) to (a) (5), inclusive, of this Sec. 1364.454, nothing therein contained shall be construed to permit a total charge for transportation and/or local delivery from the point at which the meat was slaughtered to the place of business or receiving point of a retail seller, purveyor of meals, war procurement agency, other government agency or commercial user of more than 50¢ per cwt. in Price Zone 1, 2, 5, 6, 7, 8, 9, or 10, or 75¢ per cwt. in Price Zone 3 or 4. The transportation and local delivery additions permitted in this paragraph (a) are on a hundredweight basis, and the charge for transportation and/or local delivery for any fraction of a hundredweight shall be reduced accordingly. The additions specified in this paragraph (a) for transportation and/or local delivery may be charged: Provided, That the seller shall itemize separately on

an invoice to the buyer the amount charged the buyer for transportation and/or local delivery, except that if such separate statement of transportation charges is prohibited by local law, the seller shall maintain in his own record of the transaction a separate statement of any addition for transportation or local delivery which is included in the maximum price charged.

* * *

(g) Peddler-truck selling addition. On a peddler truck sale involving delivery of not more than 100 pounds of beef in a total delivery of not more than 150 pounds of meats and meat products in any one day from such peddler-truck to any buyer's store door, a peddler may add to the prices specified in Sec. 1364.452 (Schedule I) the sum of \$1.25 per cwt. This addition shall be in lieu of any local delivery and/or transportation addition permitted in Sec. 1364.454. * * *

“Sec. 1364.451:

(k) Applicable zone price of miscuts. For any beef wholesale cut which has been miscut or for any price or portion of beef which has been cut in a manner not authorized by this Revised Maximum Price Regulation No. 169, the zone price used for the determination of the maximum price shall be the applicable zone price of the lowest priced wholesale cut.”

METHOD OF CALCULATION.

Appellant was given the advantage of every additional charge which could be added to the basic price. The ceiling price computed for him was \$19.00 per hundredweight, plus \$1.75 per hundredweight as the Zone 1 addition, plus \$1.25 per hundredweight as the peddler-truck

selling addition, plus 50¢ per hundredweight as a local delivery charge. It is noted that the weight of the beef delivered by appellant was such as to limit him to the 50¢ per hundredweight delivery charge instead of the \$1.25 per hundredweight peddler-truck selling addition.

This method of computing the Maximum Price resulted in fixing a higher price at which appellant could sell beef than was permitted under a strict construction of the regulation. In addition to this questionable allowance there was the additional concession of allowing him the 50¢ maximum per hundredweight for local delivery. Obviously he was entitled, not to both the local delivery addition and the peddler-truck selling addition, but to the one of the two which fitted the circumstances of his delivery. Hence it appears that there was an error favorable to appellant in computing his maximum price at $22\frac{1}{4}$ ¢ per pound, and his true maximum price was $1\frac{1}{4}$ ¢ per pound less. However, this was an error in appellant's favor.

It is a familiar rule that a defendant cannot complain of error made in his favor, moreover, he has not complained of it.

The case was tried on the theory that the price pleaded in the Information as the maximum price was in fact the maximum. Appellant so testified and has not at the trial nor in his brief disputed that price. [R. p. 201.]

APPENDIX B.

PERTINENT PORTIONS OF THE STATUTE AND REGULATION.

Emergency Price Control Act of 1942, Pub. L. 421, 77th Cong., 2d Sess., 56 Stat. 23, January 30, 1942:

“Sec. 4. (a) It shall be unlawful, regardless of any contract, agreement, lease, or other obligation heretofore or hereafter entered into, for any person to sell or deliver any commodity, or in the course of trade or business to buy or receive any commodity, or to demand or receive any rent for any defense-area housing accommodations, or otherwise to do or omit to do any act, in violation of any regulation or order under section 2, or of any price schedule effective in accordance with the provisions of section 206, or of any regulation, order, or requirement under section 202(b) or section 205(f), or to offer, solicit, attempt, or agree to do any of the foregoing.”

Revised Maximum Price Regulation No. 169 (7 Fed. Reg. 10381):

“Sec. 1364.401. *Prohibition against selling beef and veal carcasses and wholesale cuts, and processed products at prices above the maximum—(a) Beef carcasses and wholesale cuts.* On and after December 16, 1942, regardless of any contract, agreement, or other obligation no person shall sell or deliver any beef carcass or beef wholesale cut, and no person shall buy or receive any beef carcass or beef wholesale cut at a price higher than the maximum price permitted by Sec. 1364.451; and no person shall agree, offer, solicit or attempt to do any of the foregoing. The provisions of this Revised Maximum Price Regulation No. 169 shall not be applicable to

sales or deliveries of beef carcasses or beef wholesale cuts to a purchaser, if, prior to December 10, 1942, such beef carcasses or beef wholesale cuts have been received by a carrier other than a carrier owned or controlled by the seller, for shipment to such purchaser. 'Person,' 'beef carcass,' and 'beef wholesale cut' are defined in Sec. 1364.455.

"Sec. 1364.454 Schedule III; Amounts which may be added to zone prices listed in Schedule I. Subject to the conditions hereinafter provided, the following may be added to the applicable zone price:

* * *

(2) For transportation from the point at which the meat was slaughtered in Price Zone 1, 2, 5, 6, 7, 8, 9, or 10 to a distribution point located in the same price zone as the slaughter point, other than another slaughter, packing or processing plant owned or controlled by the same seller, the seller may add the actual cost of transportation computed at the lowest common carrier rate for the method of transportation used, but in no event more than 25¢ per cwt.

(3) For local delivery made within a radius of 25 miles from a slaughter plant, packing house, car-route unloading point, railroad unloading station or branch house, to the place of business of a seller at retail, wholesaler (not owned or controlled by the shipper or consignor), hotel supply house (not owned or controlled by the shipper or consignor), or commercial user, or the designated delivery point of a war procurement agency, or other government agency; or

For local delivery made within a radius of 25 miles from the place of business of a wholesaler or hotel supply house, to the place of business of a seller at retail, purveyor of meals, or commercial user, or the

designated delivery point of a war procurement agency, or other government agency; the seller may add 25¢ per cwt. * * *

(5) For local delivery made from a slaughter plant, packing house, car-route unloading point, railroad unloading station, or branch house, located in Price Zone 1, 2, 5, 6, 7, 8, 9, or 10, to the place of business of a seller at retail, wholesaler (not owned or controlled by the shipper or consignor), hotel supply house (not owned or controlled by the shipper or consignor), or commercial user, or the designated delivery point of a war procurement agency, or other government agency, located more than 25 miles from such shipping point; or

For local delivery made from the place of business of a wholesaler or hotel supply house located in Price Zone 1, 2, 5, 6, 7, 8, 9, or 10, to the place of business of a seller at retail, purveyor of meals or commercial user, or the designated delivery point of a war procurement agency or other government agency, located more than 25 miles from such shipping point; the seller may add the actual cost of local delivery computed at the lowest common carrier rate for the method of delivery used, but in no event more than 50¢ per cwt.

(6) Notwithstanding any of the provisions of paragraph (a) (1) to (a) (5), inclusive, of this Sec. 1364.454, nothing therein contained shall be construed to permit a total charge for transportation and/or local delivery from the point at which the meat was slaughtered to the place of business or receiving point of a retail seller, purveyor of meals, war procurement agency, other government agency or commercial user of more than 50¢ per cwt. in Price Zone 1, 2, 5, 6, 7, 8, 9, or 10, or 75¢ per cwt.

in Price Zone 3 or 4. The transportation and local delivery additions permitted in this paragraph (a) are on a hundredweight basis, and the charge for transportation and/or local delivery for any fraction of a hundredweight shall be reduced accordingly. The additions specified in this paragraph (a) for transportation and/or local delivery may be charged: Provided, That the seller shall itemize separately on an invoice to the buyer the amount charged the buyer for transportation and/or local delivery, except that if such separate statement of transportation charges is prohibited by local law, the seller shall maintain in his own record of the transaction a separate statement of any addition for transportation or local delivery which is included in the maximum price charged. * * *

(g) Peddler-truck selling addition. On a peddler truck sale involving delivery of not more than 100 pounds of beef in a total delivery of not more than 150 pounds of meats and meat products in any one day from such peddler-truck to any buyer's store door, a peddler may add to the prices specified in Sec. 1364.452 (Schedule I) the sum of \$1.25 per cwt. This addition shall be in lieu of any local delivery and/or transportation addition permitted in Sec. 1364.454. * * *

“Sec. 1364.451:

(k) Applicable zone price of miscuts. For any beef wholesale cut which has been miscut or for any price or portion of beef which has been cut in a manner not authorized by this Revised Maximum Price Regulation No. 169, the zone price used for the determination of the maximum price shall be the applicable zone price of the lowest priced wholesale cut.”

Amendment 15 to the Revised Maximum Price Regulation No. 169 (8 Fed. Reg. 7675):

“2. Section 1364.452 (d) (2) is amended by changing the table of prices to read as follows:

(All prices are on dollars per hundredweight basis; the price for any fraction of a hundredweight shall be reduced accordingly.)

					(Bologna bulls (Equivalent cutter and can- ner grade	
“Steer or Heifer	Choice or AA	Good or A	Commercial or B	Utility or C	Cutter Canner or D	
(i) Beef carcass or side	\$20.00	19.00	17.00	15.00	12.50	13.00”

2
No. 10654

United States
Circuit Court of Appeals
For the Ninth Circuit.

UNITED STATES OF AMERICA,
Appellant,
vs.

PUGET SOUND POWER AND LIGHT COM-
PANY, a corporation,
Appellee.

Transcript of Record

Upon Appeal from the District Court of the United States
for the Western District of Washington,
Northern Division

FILED

FEB 29 1944

PAUL B. O'BRIEN,
CLERK

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United States
Circuit Court of Appeals

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UNITED STATES OF AMERICA,
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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur.]

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NAMES AND ADDRESSES OF COUNSEL

Attorneys for Appellant:

MR. NORMAN M. LITTELL,
Assistant Attorney General
Department of Justice
Washington, 25, D. C.

MR. FRANK P. KEENAN,
Special Assistant to The Attorney General
655 Skinner Building
Seattle, 1, Wash.

MR. VERNON L. WILKINSON,
Attorney
Department of Justice
Washington, 25, D. C.

MR. LAWRENCE VOLD,
Attorney
Department of Justice
Washington, 25, D. C.

MR. HAROLD W. ANDERSON,
Special Attorney, Department of Justice
655 Skinner Building
Seattle, 1, Wash.

Attorneys for Appellee:

MESSRS. HOLMAN, SPRAGUE & ALLEN,
Hoge Building
Seattle, Wash. [1*]

In the District Court of the United States
For the Western District of Washington
Northern Division

No. 530

UNITED STATES OF AMERICA,
Petitioner,

v.

CERTAIN PARCELS OF LAND IN RENTON,
COUNTY OF KING, STATE OF WASH-
INGTON,

MIKE N. SARGENT and JANE DOE SARGENT;
his wife;

* * * * *

CITY OF RENTON, a municipal corporation;
COUNTY OF KING, a municipal corporation;
STATE OF WASHINGTON;

ALSO UNKNOWN OWNERS AND ALL PER-
SONS UNKNOWN CLAIMING ANY
RIGHT, TITLE OR INTEREST IN THE
PROPERTY HEREIN DESCRIBED, OR
ANY PORTION THEREOF,

Respondents.

PETITION IN CONDEMNATION

To the Honorable Judge of the United States
District Court for the Western District of Wash-
ington, Northern Division:

The United States of America, petitioner herein,
by F. P. Keenan, Special Assistant to the Attorney

General, and Frank Pellegrini, Special Attorney, Department of Justice, [2] acting under the instructions of the Attorney General of the United States and at the request of Herbert Emmerich, Commissioner of the Federal Public Housing Authority of the United States of America, respectfully shows as follows.

I.

This is a suit of a civil nature brought by the petitioner under the authority of and pursuant to the provisions of the Act of Congress of August 1st, 188, 25 Stat. 357 (U.S.C. Title 40, Sec. 257); the Act of February 26th 1931, 46 Stat. 1421 (U.S.C. Title 40, secs. 258 (a) to 258 (e); the Act of October 14th, 1940 (Public No. 849, 76th Congress), as amended, and Executive Order No. 9070, dated February 24, 1942, the Act of March 27, 1942 (Public Law No. 507, 77th Congress), and Executive Order No. 9150, dated April 28, 1942, funds having been appropriated by the Act of May 24, 1941 (Public No. 73, 77th Congress), and under the further authority of the declaration of taking dated June 1, 1942, executed on behalf of the United States of America, by Herbert Emmerich, Commissioner of the Federal Public Housing Authority of the United States of America, filed simultaneously in this Court with the filing of this petition.

II.

The Commissioner of the Federal Public Housing Authority of the United States of America has selected for acquisition by the United States of

America the land hereinafter described, and has designated and determined that said lands, subject to a transmission line easement running northerly and southerly along the eastern side of the site; also subject to the right-of-way for State Road #2, known as Sunset Highway, as shown on the plat entitled "Land Being Acquired for Defense Housing Project, Renton, King County, Washington, WASH-45058, and WASH-45134, dated May 25, 1942." [3] as set forth in the declaration of taking, on file herein, is suitable and necessary for public use, to-wit, in order to provide housing for persons engaged in national defense activities, and their families, in those areas or localities in which the President of the United States has found an acute shortage of housing exists or impends, which would and does impede national defense activities, and that such housing would not be provided by private capital when needed.

III.

In accordance with the provisions of Section 1 of the Act of October 14th, 1940 (Public 849, 76th Congress,) the President of the United States of America has found that an acute shortage of housing exists in the area or locality in and about King County, State of Washington, which impedes the national defense activities, and has found further that such housing would not be provided by private capital when needed.

IV.

The purposes for which petitioner is taking said land hereinafter described, including all buildings

and improvements thereon, if any, all appurtenances thereto and all interests therein, are necessary and constitute a public use, and the use to which said property is to be applied is a use authorized by law, and no part of said land has heretofore been appropriated for public use by said petitioner.

V.

The estate or interest in and to said land herein-after described, which petitioner intends and seeks to take, acquire, condemn, hold, and own by this proceeding, is that of owner in full fee simple title, subject, however, to the transmission line easement running northerly and southerly along the eastern side of the site; also subject to the right-of-way for State Road No. 2, known as Sunset [4] Highway, as set forth in the declaration of taking on file herein, free and clear and discharged from all liens, encumbrances, servitudes, easements, charges, demands, claims, restrictions and covenants whatsoever.

VI.

The land to be taken and condemned in this proceeding is a tract containing 283.034 acres, more or less, lying and being in the County of King, State of Washington, and described as follows:

Being a portion of Block 7 and 8, all of Block 12, all of Block 13, and all of Blocks 16, 17, 18 in the Plat of Rainier Acres, King County, Washington.

Also:

A portion of the Northwest quarter of Section 9, T 23 N, R 5 E, Willamette Meridian, and a portion

of the Southwest quarter of Section 4, T 23 N., R 5 E, Willamette Meridian, said tract being more particularly described as follows:

Beginning at a monument being the Southeast corner of Block 18 in the Plat of Rainier Acres, King County, Washington; thence North 89 degrees 14 minutes 37 seconds West along the South line of Block 18, 13 and 12 for 1298.28 feet to the Southwest corner of Block 12; thence North 1 degree 01 minute East along the West line of said Block 12 for 469.57 feet; thence North 89 degrees 06 minutes 52 seconds West for 431.39 feet to the East margin of Renton Avenue; thence North 1 degree 01 minute East along the East margin of Renton Avenue for 709.54 feet to the Northwest corner of Lot 1, Block 8, said Plat of Rainier Acres; thence South 88 degrees 59 minutes East for 190.7 feet; thence South 1 degree 01 minutes West for 189.0 feet to the Southeast corner of said lot 1; thence South 88 degrees 59 minutes East for 1053.50 feet to the Southeast corner of Block 14 of said Plat; thence North 1 degree 01 minute East for 1625.17 feet to an intersection with the East and West center line of Section 9, T 23 N. Range 5 E, Willamette Meridian; thence South 88 degrees 50 minutes 13 seconds East along said East center of said Section 9, said point also being the West margin of Boundary Avenue in accordance with said Plat of Rainier Acres for 431.16 feet; thence South 0 degrees 10 minutes 36 seconds East along said West margin of Boundary Avenue for 2607.88 feet to the

true point of beginning; subject to an easement for power line right-of-way lying within the above described tract, the center line of the easement being described as follows: [5]

A strip of land 100 feet in width being 50 feet on each side of the following described center line;

Commencing at the $\frac{1}{4}$ corner common to Sections 9 and 16, T 23 N R, 5 E, Willamette Meridian; thence North 89 degrees 14 minutes 37 seconds West for 223.16 feet; thence North 4 degrees 53 minutes 48 seconds East for 30.08 feet to the true point of beginning; thence North 4 degrees 53 minutes 48 seconds East for 1294.06 feet; thence North 0 degrees 09 minutes 52 seconds West for 1317.53 feet to the North line of the Southwest quarter of said Section 9, containing 2,258,584 square feet or 51.850 acres.

ALSO: Beginning at a monument being the $\frac{1}{4}$ corner common to Sections 8 and 9, T 23 N, R, 5 E, Willamette Meridian; thence North 0 degrees 57 minutes 45 seconds East along the West line of said Section 9 for 995.10 feet to the Northwest corner of the South half of the North half of the Southwest quarter of the Northwest quarter of said Section 9; thence South 88 degrees 53 minutes 44 seconds East for 322.30 feet to the Northeast corner of the Southwest quarter of the Northwest quarter of the Southwest quarter of the Northwest quarter of said Section 9; thence North 0 degrees 49 minutes 15 seconds East along the West line of the East half of the Northwest quarter of the Southwest quarter of the Northwest quarter of said Section 9 and the West

line of the East half of the West half of the Northwest quarter of the Northwest quarter of said Section 9 for 1629.10 feet to an intersection with the South margin of the County Road; thence South 88 degrees 59 minutes 45 seconds East along said South margin for 318.27 feet to an intersection with the West line of the East half of the Southwest quarter of the Southwest quarter of Section 4, Township 23 N, Range 5 East, Willamette Meridian, produced in a straight line; thence North 0 degrees 41 minutes 44 seconds East along said West line for 1017.01 feet to the Southwest corner of the North half of the Northwest quarter of the Southwest quarter of the Southwest quarter of said Section 4; thence North 88 degrees 44 minutes 57 seconds West for 609.44 feet to the East margin of the County Road; thence North 0 degrees 31 minutes 09 seconds East, parallel to, and 30 feet East of the West line of said Section 4 for 550.06 feet; thence angle right 90 degrees on a course of South 89 degrees 28 minutes 51 seconds East for 235.0 feet; thence angle left 90 degrees on a course of North 0 degrees 31 minutes 09 seconds East for 100.0 feet; thence South 89 degrees 28 minutes 51 seconds East for 216.78 feet; thence North 0 degrees 31 minutes 09 seconds East for 477.61 feet; thence South 88 degrees 20 minutes 30 seconds East for 161.11 feet to an intersection with the West line of the Northeast quarter of the Northwest quarter of the Southwest quarter of said Section [5a] 4; thence North 0 degrees 41 minutes 44 seconds East for 512.80 feet to the North line of the Southwest

quarter of said Section 4; thence South 88 degrees 20 minutes 30 seconds East along the North line of said Southwest quarter for 1289.13 feet to the Northeast corner of the West half of the Northeast quarter of the Southwest quarter; thence South 1 degrees 03 minutes 02 seconds West along the East line of said West half of the Northeast quarter of the Southwest quarter and along the East line of the West half of the Southeast quarter of the Southwest quarter and it's production in a straight line 2647.31 feet to an intersection with the South margin of County Road; thence South 88 degrees 59 minutes 45 seconds East parallel to, and 30 feet South of the North line of the Northwest quarter of said Section 9, also being the South margin of County Road for 607.02 feet to an intersection with a point 30 feet West of the North and South center line of said Section 9; thence South 0 degrees 10 minutes 11 seconds East parallel to, and 30 feet West of said North and South center line of said Section 9 for 2631.28 feet to an intersection with the East and West center line of said Section 9; thence North 88 degrees 50 minutes 13 seconds West for 2568.17 feet to the point of beginning.

Subject to an easement for power-line right-of-way within the Northwest quarter of Section 9, the center line of easment being described as follows:

A strip of land 100 feet in width being 50 feet on each side of the following described center line:

Commencing at the 1/4 corner common to Sec-

tions 4 and 9, Township 23 N. Range 5 East Willamette Meridian, being monument #9; thence North 88 degrees 59 minutes 45 seconds West for 105.60 feet; thence South 0 degrees 09 minutes 52 seconds East for 30.0 feet being the true point of beginning; thence South 0 degrees 09 minutes 52 seconds East for 2631.06 feet to the South line of said Northwest quarter.

Also:

Subject to a right-of-way for State Road #2, (Sunset Highway) and being more particularly described as follows:

Commencing at the 1/4 corner common to Sections 4 and 9, T 23 N. Range 5 E, Willamette Meridian; thence South 0 degrees 10 minutes 11 seconds East for 30.0 feet; thence North 88 degrees 59 minutes 45 seconds West for 505.13 feet to the true point of beginning;

thence South 35 degrees 42 minutes West for 1669.97 feet; thence along the arc of a curve to the right having a radius of 439.51 feet and consuming an angle of 113 degrees 06 minutes for an arc distance of 867.58 feet; thence North 31 degrees 12 minutes West for 65.17 feet to an intersection with the West line of the East half of the West half of the West half of the Northwest quarter of said Section 9; thence [5b] North 0 degrees 49 minutes 15 seconds East for 113.16 feet; thence South 31 degrees 12 minutes East for 161.11 feet; thence along the arc of a curve to the left having a radius of 379.51 feet and consuming an angle of 113 degrees 06 minutes for an arc distance of 749.14

feet; thence North 35 degrees 42 minutes East for 1628.43 feet to an intersection with the South margin of County Road, said South margin being 30 feet South of the North line of the Northwest quarter of said Section 9; thence South 88 degrees 59 minutes 45 seconds East for 72.98 feet to the true point of beginning.

Containing 10,089,959 square feet or 229.774 acres, more or less.

Also: Lots 33, 34, and 35 in the Plat of Harries Garden Home Tract, King County, Washington, being more particularly described as follows:

Beginning at the Southeast corner of the Southwest quarter of the Northeast quarter, Section 8 T 23 N, R 5 E, Willamette Meridian, said point also being the Southeast corner of Lot 33 of said plat; thence North 0 degrees 56 minutes 36 seconds East for 100.0 feet; thence North 89 degrees 02 minutes 21 seconds West for 184.05 feet to the East Margin of State Highway No. 2 (Sunset Highway); thence following said East margin South 8 degrees 28 minutes 59 seconds West for 268.58 feet and along the arc of a curve to the left having a radius of 543.14 feet and consuming an angle of 3 degrees 50 minutes 45 seconds for an arc distance of 36.45 feet to the Southwest corner of Lot 35, said plat; thence south 89 degrees 42 minutes 01 seconds East for 222.72 feet; thence North 0 degrees 59 minutes 02 seconds East for 199.96 feet to the point of beginning, and containing 61,415 square feet or 1.410 acres.

The total above description includes 12,328,956

square feet or 283.034 acres, more or less, together with the improvements thereon, as shown on plat entitled "Land Being Acquired for Defense Housing Project at Renton, King County, Washington, Projects Wash-45058 and Wash-45134, from Property Line Map, Sievers & Duecy, Engineers, dated March, 1942", copy of which is attached to declaration of taking.

(Particularized property description omitted—Clerk.) [5c]

VII.

Simultaneously with the filing of this petition, Herbert Emmerich, *Commission* of the Federal Public Housing Authority of the United States, is causing to be filed in the Court and cause, on behalf of petitioner, a declaration of taking, pursuant to the provisions of the Act of February 26th, 1931 (46 Stat. 1421), wherein and whereby said land heretofore described is taken in full fee simple title, subject however, to a transmission line easement running northerly and southerly along the eastern side of the site; also subject to the right of way for State Road No. 2, known as Sunset Highway, as set *for* in the declaration of taking, on file herein, for the use and benefit of the United States as aforesaid, and with the filing of said declaration of taking petitioner is paying into the Registry of Court for the use of the persons entitled thereto, as the estimated just compensation for the taking of said land hereinbefore described, the sum of \$84,390.00.

Wherefore, *petition* prays judgment as follows:

1. That the Court ascertain and assess the value of the property herein sought to be taken and condemned, and of each and every separate estate or interest therein;

2. Adjudging that the public uses for which petitioner takes and condemns said land are necessary public uses of the petitioner, and that the uses to which said property is to be applied are uses authorized by law, and that all of said land taken is necessary thereto;

3. Vesting in the United States of America full fee simple title, subject, however, to a transmission line easement running northerly and southerly along the eastern side of the site; also subject to the right-of-way for State [6] Road No. 2, known as Sunset Highway, as set forth in the declaration of taking on file herein, and adjudging that said land shall be deemed to be condemned and taken for the use of the United States for the purposes and uses hereinbefore set forth, and further adjudging that the right to just compensation for the said land hereinbefore described be vested in the persons entitled thereto as their respective interests may appear and be established and adjudged herein, and that said compensation shall be ascertained and awarded in this proceeding and established by judgment herein, and a time fixed within which, and the terms upon which, the parties in possession shall be required to surrender possession to the petitioner, United States of America.

4. That all liens or encumbrances of record

against the property herein sought to be taken and condemned be satisfied out of the award to be made in this proceeding.

5. For such other and further relief as the Court deems meet and proper in the premises and as the nature of the case may require.

F. P. KEENAN

Special Assistant to the
Attorney General

FRANK PELLEGRINI

Special Attorney,
Department of Justice [7]

United States of America,
Western District of Washington,
Northern Division—ss.

F. P. Keenan, being first duly sworn, on oath deposes and says:

He is a Special Assistant to the Attorney General, and as such makes this affidavit for and on behalf of the United States, petitioner herein; he has read the foregoing petition, knows the contents thereof, and the same is true of his own knowledge except as to matters which are therein stated on his information or belief, and as to those matters he believes them to be true.

The source of affiant's information and the grounds for his belief are the official communications, records, files and documents received from the Attorney General of the United States and from the National Housing Agency.

F. P. KEENAN

Subscribed and sworn to before me this 16th day
of June, 1942.

[Seal]

C. R. FITZGERALD

Deputy Clerk, United States
District Court, Western
District of Washington

[Endorsed]: Filed June 16, 1942. [8]

[Title of District Court and Cause.]

DECLARATION OF TAKING

I. Herbert Emmerich, Commissioner of the Federal Public Housing Authority of the United States of America, do hereby declare that:

1. (a) The lands described in Schedule A attached, are hereby taken for the use of the United States under the authority of the Act of August 1, 1888, 25 Stat. 357 (U. S. C. Title 40, Sec. 257); the Act of February 26, 1931, 46 Stat. 1421 (U.S.C. Title 40, Secs. 258(a) to 258 (e); the Act of October 14, 1940 (Public No. 849, 76th Congress as amended, and Executive Order No. 9070 dated February 24, 1942, funds having been appropriated by the Act of May 24, 1941 (Public No. 73, 77th Congress);

(b) The public use for which said lands are taken is the provision of housing, pursuant to said Act of October 14, 1940, as amended.

2. A description of said lands sufficient for the

identification thereof is set forth in Schedule A, annexed, and made a part hereof.

3. The estate taken for said public use is the full fee simple title in and to said lands, subject to a transmission line easement running northerly and southerly along the eastern side of the site; also subject to the right-of-way for State Road #2, known as Sunset Highway, as shown on the plat entitled "Land Being Acquired for Defense Housing Project, Renton, King County, Washington, WASH-45058, and WASH-45134, dated May 25, 1942." [9]

4. A plan showing said lands is annexed, as Schedule B, and made a part hereof.

5. The sum of money estimated by me to be just compensation for said lands, including all buildings and improvements thereon, if any, all appurtenances thereto, and all interests therein, is set forth in Schedule A annexed hereto and made a part hereof. Said sum I herewith deposit in the registry of this Court to the use of the persons entitled thereto.

I am of the opinion that the ultimate award of compensation for the taking of said lands will be within any limits prescribed by law to be paid as the price therefor.

In witness whereof, I, Herbert Emmerich, Commissioner of Federal Public Housing Authority, thereunto duly authorized have signed this Declaration of Taking, acting as Commissioner of Federal Public Housing Authority, this 1st day of June,

1942, in the City of Washington, District of Columbia.

UNITED STATES OF AMERICA
[Signed] By HERBERT EMMERICH
Federal Public Housing
Commissioner [10]

SCHEDULE "A"

(Property description up to parcel 45 omitted)
—Clerk.

Parcel 45:

Being the land, together with the improvements thereon, as shown on the attached plat, marked Exhibit "B", containing 40.471 acres, more or less. Purported owner Julia U. Bonnar and King County.
Estimated value\$6,500.00

Parcel 46:

Being the land, together with the improvements thereon, as shown on the attached plat, marked Exhibit "B", containing 0.865 acres, more or less. Purported owner, Estate of James Albert Longbottom.
Estimated value\$ 50.00

Parcel 47:

Being the land, together with the improvements thereon, as shown on the attached plat, marked Exhibit "B", containing 1.624 acres more or less. Purported owner, Julia U. Bonnar. Estimated value \$ 350.00

Parcel 48:

Being the land, together with the improvements thereon, as shown on the attached plat, marked Exhibit "B", containing 0.831 acres, more or less. Purported owner, Clifford G. Morrison. Estimated value\$ 75.00

Parcel 49:

Being the land, together with the improvements thereon, as shown on the attached plat, marked Exhibit "B", containing 0.827 acres, more or less. Purported owner Joseph Plute, Jr. and Elina Plute. Estimated value\$5,100.00

Parcel 51:

Being the land, together with the improvements thereon, as shown on the attached plat, marked Exhibit "B", containing 0.911 acres, more or less. Purported owner Ewart Harris and Richard Harris. Estimated value\$1,025.00

Parcel 52:

Being the land, together with the improvements thereon, as shown on the attached plat, Marked Exhibit "B", containing 0.499 acres, more or less. Purported owner C. L. Dixon and Thomas Harries, Trustee. Estimated value\$ 550.00

Public streets:

All those portions of Sunset Highway (State Road No. 2), Fir Avenue, Summers Avenue, Center Avenue, Bile Street, Young Street and North Street, and the County Road, lying northerly of parcels 9, 8, 7, and 39, as shown on the attached plat within the area of the project site. Purported owner King County. Estimated Value....\$ 1.00

The total sum of money estimated by the acquiring authority to be just compensation for the aforesaid land in this proceeding and hereby taken is \$84,390.00.

[Endorsed]: Filed June 16, 1942. [11]

In the District Court of the United States for the
Western District of Washington, Northern Di-
vision

No. 530

UNITED STATES OF AMERICA,
Petitioner,

v.

CERTAIN PARCELS OF LAND IN RENTON,
COUNTY OF KING, STATE OF WASH-
INGTON;

MIKE N. SARGENT and REBECCA SARGENT,
his wife;

* * * * *

PUGET SOUND POWER & LIGHT COMPANY,
a corporation,

Respondents.

NOTICE AND SUMMONS

The President of the United States of America,
To the Above Named Respondents:

Notice is hereby given to the above named re-
spondents, and to each of them, and also to the un-
known owners and all persons unknown having or
claiming an interest or estate in the property herein
described, or any portion thereof, that hereafter,
to-wit, on the 1st day of March, 1943, at the hour
of 10:00 o'clock A.M., or at such time thereafter to
which said hearing may be adjourned, in the Court-
room of the United States District Court for the

Western District of Washington, Northern Division, in the United States Courthouse in Seattle, Washington, and within the above named division and district, the above named petitioner will present to the Honorable Lloyd L. Black, Judge of the above entitled Court, the petition of the United States of America which has been filed in this cause in the office of the Clerk of the District Court, and that thereafter said petition will be brought on for hearing at such time and place as the said hearing may be by the Court at that time or times adjourned. [12]

The object of the petition filed herein is to condemn and appropriate all of the property hereinafter described to the use and purposes of the United States of America, and to acquire in the name of, and for the United States of America, title and ownership of the property hereinafter described and each particular part and parcel thereof for Defense Housing purposes.

Petitioner, by the allegations of its petition filed herein and through this proceeding, prays the Court that it find and decree that the contemplated use for which the property hereinafter described is sought to be appropriated is a public use and that the public interest requires the acquisition of the land hereinafter described, and that the condemnation and appropriation of the property hereinafter described is necessary for said public use, and petitioner has petitioned the Court that an order be entered herein directing the Marshal to summon a jury hereafter to be impaneled in order to ascer-

tain and determine the compensation to be made in money to the above named respondents, and each of them, and to all tenants, encumbrancers, and others interested in the property hereinafter described, insofar as the interest of each may appear.

Notice is further given to each and every person interested in said property, or any of it, or in the money deposited in the Registry of this Court as estimated just compensation for any of the property in the petition or in this notice described, or any sums that may hereafter be adjudged to be just compensation for said property, to be and appear before the above entitled Court on said 1st day of March, 1943.

The land so condemned and taken is a tract lying and being in the County of King, State of Washington, and more particularly described as follows:

(Property Description Omitted.)

—Clerk. [13]

The estate taken by the petitioner, United States of America, in and to the lands hereinabove described is the full fee simple title, subject to a transmission line easement running northerly and southerly along the eastern side of said land; also subject to the right of way for said Road No. 2, known as Sunset Highway. Petitioner has prayed that said property be decreed to be the property of the United States of America and that just compensation for the taking thereof be awarded to the persons entitled thereto.

This notice has been given and proceeding insti-

tuted by and with the authority of The Attorney General of the United States.

Witness the Honorable Lloyd L. Black, Judge of the United States District Court in and for the Western District of Washington, and the seal thereof. Dated at Seattle, Washington, this 22 day of January 1943.

[Seal] JUDSON W. SHORETT,
Clerk.

By E. NICHOLS,
Deputy.

F. P. KEENAN

Special Assistant to The Attorney General

HAROLD W. ANDERSON

Special Attorney

Department of Justice

[Endorsed]: Filed Jan. 22, 1943. [14]

[Title of District Court and Cause.]

APPEARANCE AND ANSWER OF PUGET
SOUND LIGHT & POWER COMPANY

Comes now Puget Sound Power & Light Company and in response to the notice and summons issued herein on the 22nd day of January, 1943, enters its appearance herein and alleges as follows:

I.

During all the times hereinafter mentioned this respondent was and is now a corporation duly or-

ganized and existing under the laws of the State of Massachusetts and authorized to do business and doing business in the State of Washington.

II.

For many years last past this respondent has been and is now engaged in the electric public-utility business within the State of Washington, owning and operating various hydro-and-steam electric generating plants, with transmission and distribution lines connected thereto, and by means thereof respondent supplies electric energy to a large part of the population living in nineteen counties in the western part of said state, and, in particular, to the residents of King County, Washington.

III.

Respondent is the owner of various electric transmission and distribution lines within and adjacent to the area described in the Declaration of Taking, Petition in Condemnation, and Judgment on Declaration of Taking, and appropriated by the United States [15] pursuant to these proceedings, which electric lines are located, some on public highways, for which respondent holds valid unexpired franchises duly granted by the proper public authorities, and some thereof located and maintained, with the consent of the owners, upon privately-owned land within the area of this condemnation.

IV.

By reason of the taking of the said land by the United States, the property and franchise rights

of this respondent will be interfered with and taken or damaged and by reason of the taking thereof its remaining electric public utility system will suffer damage; nothing has been paid to this respondent on account thereof or deposited in the registry of this court as compensation therefor.

Wherefore, respondent prays that the amount of just compensation to be paid to this respondent by the United States for the property of the respondent taken and damaged by these proceedings be ascertained herein, in the manner provided by law, and that it have judgment against the United States therefor, with interest as allowed by law.

HOLMAN, SPRAGUE &

ALLEN

Attorneys for Respondent,
Puget Sound Power & Light
Company. [16]

State of Washington,
County of King—ss.

C. F. Terrell, being first duly sworn, on oath deposes and says: That he is Vice President of Puget Sound Power & Light Company, a corporation, one of the respondents in the above entitled action; that he makes this verification by authority of and in its behalf; that he has read the foregoing Appearance and Answer of Puget Sound Power & Light Company, knows the contents thereof and believes the same to be true.

C. F. TERRELL

Subscribed and sworn to before me this 26th day of April, 1943.

[Seal] D. J. TORRANCE

Notary Public in and for the State of Washington,
residing at Seattle.

Copy Rec'd 4/26 - 43.

F. P. KEENAN.

[Endorsed]: Filed Apr. 26, 1943. [17]

[Title of District Court and Cause.]

STIPULATION

It Is Agreed between the United States of America, represented by Harold W. Anderson, Special Attorney, Department of Justice, and by the respondent, Puget Sound Power & Light Company, represented by Holman, Sprague & Allen, its attorneys, as follows:

1. Puget Sound Power & Light Company is an electric public utility operating several electric generating plants in Western Washington and an extensive inter-connected transmission system by means of which it distributes said electricity to the public generally in nineteen counties in the Northwestern part of the State, and said company is authorized to carry on such business within the State of Washington.

2. In the area taken by the Government in this proceeding, the Company owns and operates certain electric lines upon public roads under a franchise granted by the County Commissioners of King

County, Washington; it owns and operates other lines upon privately-owned land pursuant to easements granted by the owners of said land and duly recorded; other lines are located upon private property and operated without written easements but with the oral or tacit consent of the owners of such land. The franchise above mentioned will expire in 1953. A map showing the location of said lines is attached to this stipulation, marked Exhibit A, [18] and by this reference made a part hereof.

3. An easement has been granted to said Company by the United States of America acting by and through the Federal Public Housing Authority for the continued operation of the Company's electric line on that portion of Southeast 112th Street (otherwise known as County Road No. 431) located within the boundaries of the condemnation area, and no question of damages arises as to this line.

4. The amounts of damages which are at issue in this case are the following:

(a) Cost to remove distribution line located on privately-owned land and operated pursuant to written easement granted by the owners\$73.00

(b) Cost to remove distribution lines located at date of commencement of condemnation proceedings upon privately-owned land without written easements, but with the consent, either tacit or oral, of the owners..268.00

(c) Cost of removing a distribution line presently (at date of commencement of condemnation proceedings) operated on Bile

Street pursuant to franchise granted by the
County Commissioners of King County, Wash-
ington156.99

(d) Cost to rebuild new line in new loca-
tion outside of condemnation area to continue
service to customer located without the project
area408.98

5. The respondent contends that it is entitled to compensation for all of said items upon the basis above set forth, but the government contends that respondent is entitled to no damages whatever for items (b), (c) and (d), conceding only respondent's right to the sum of seventy-three dollars for item (a). The amounts set forth in all of said items are agreed upon, and no further evidence thereof need be introduced by either party.

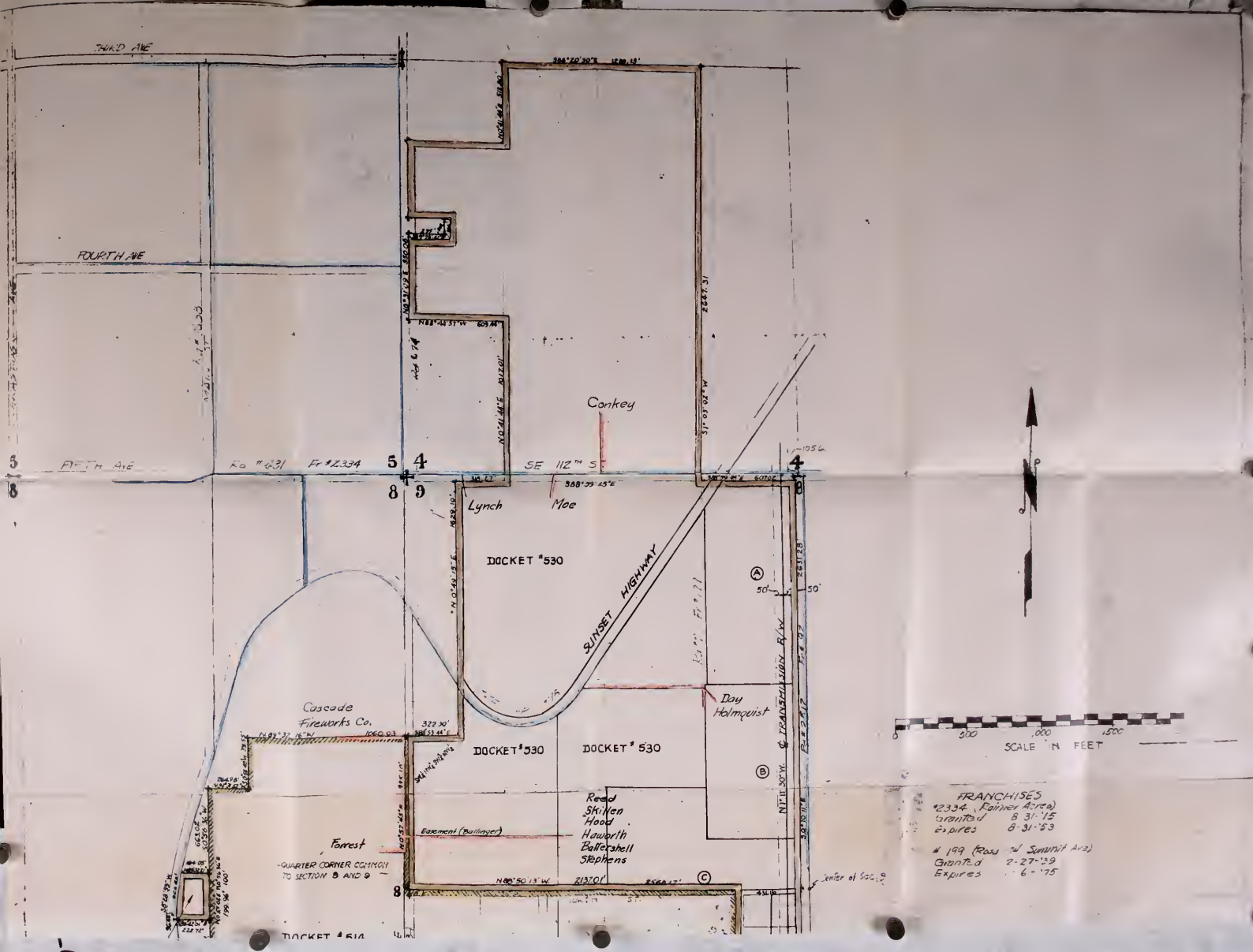
HAROLD W. ANDERSON

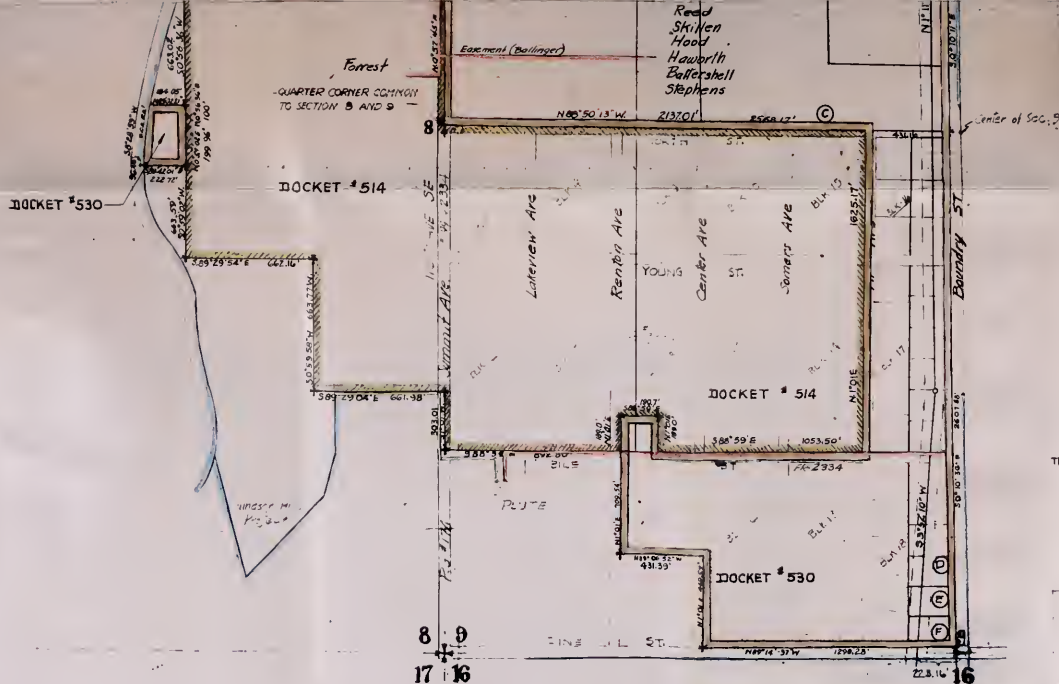
Special Attorney, Lands Divi-
sion, Department of Justice

HOLMAN, SPRAGUE &
ALLEN

Attorneys for Puget Sound
Power & Light Company.

[Endorsed]: Filed June 30, 1943. [19]





TRANSMISSION LINE EASEMENTS TO R.S.P. & L. Co.
GRANTOR

- (A) Mabel Petzer Terrell
- (B) C.A. Day et al.
- (C) Anna Ruegg et al.
- (D) Julia D. Bonner et al.
- (E) James A. Longbottom et al.
- (F) William Morrow

FRANCHISES TO BE REMOVED OR RELOCATED
PROJECTS WASH. 45134 45058-45059
NEAR RENTON KING CO WASH.

PUGET SOUND POWER & LIGHT COMPANY

ENGINEERED BY J. W. HARRIS
DATE 6-4-43

[Title of District Court and Cause.]

PETITIONER'S MOTION FOR NEW TRIAL

Comes Now the petitioner, United States of America, and moves for a new trial upon the following grounds:

1. Insufficiency of the evidence to justify the judgment of the Court.
2. Error in law occurring at the trial and excepted to at the time by the petitioner.

F. P. KEENAN

Special Assistant to The At-
torney General

HAROLD W. ANDERSON

Special Attorney
Department of Justice

Office and Post Office Address:

655 Skinner Building
Seattle, Washington

Received Jul - 2 1943. D. J. Holman, Sprague & Allen.

[Endorsed]: Filed July 2, 1943. [21]

[Title of District Court and Cause.]

MOTION FOR NEW TRIAL DENIED

Now on this 16th day of August, 1943, this cause comes on for hearing before the court, Harold W. Anderson, Special Attorney, Department of Justice, appearing for petitioner and Emory Hess, attorney

appearing for respondents, on motion of petitioner for new trial. Argument by Mr. Anderson for petitioner and argument by Mr. Hess for respondent Puget Sound Power & Light. Court denies motion for new trial and allows petitioner exception. Findings of Fact and Conclusions of Law to be presented later by both sides.

(Journal No. 32, page 150) [22]

[Title of District Court and Cause.]

FINDINGS OF FACT AND CONCLUSIONS OF LAW

This Matter having come on for trial on June 30, 1943, petitioner, United States of America, being represented by F. P. Keenan, Special Assistant to the Attorney General, and Harold W. Anderson, Special Attorney, Department of Justice, respondent, Puget Sound Power and Light Company, a corporation, being represented by Holman, Sprague and Allen, and Emory E. Hess, its attorneys; a jury having been waived on motion of the petitioner and respondent, and the parties having filed a stipulation as to the facts and contentions of the respective parties, the Court being fully advised in the premises makes the following:

FINDINGS OF FACT

I.

That on June 16, 1942, the petitioner, United States of America, pursuant to Acts of Congress,

condemned and appropriated for the public use, to wit, to provide housing for persons engaged in national defense activities certain real property described in the Declaration of Taking and Petition in Condemnation on file herein; that included in said real property taken were certain public street and county road areas in addition to certain privately-owned lands. [23]

II.

That immediately prior to the filing of the Declaration of Taking herein, the respondent, Puget Sound Power and Light Company, a corporation, was the owner of a recorded written easement over privately-owned land on which it maintained an electric power service line; that said respondent, Puget Sound Power and Light Company, a corporation, maintained electric power transmission lines upon privately-owned land without written easements, but with the tacit or oral consent of the owners; that said respondent, Puget Sound Power and Light Company, a corporation, was the owner of a franchise granted by the County Commissioners of King County, State of Washington, to maintain an electric power distribution line on Bile street, a public street, within the area condemned, which franchise was being exercised by said respondent to maintain its power poles and lines in said street area.

III.

That respondent, Puget Sound Power and Light Company, a corporation, removed its electric power

poles and lines from said privately-owned lands and said public street, all within the area condemned, and on January 22, 1943, rebuilt one of said lines, formerly located on said public street where said respondent held a franchise, in a new location outside of the condemnation area to continue service to a customer located outside the condemnation area.

IV.

That by stipulation filed in the cause, the petitioner and said respondent, Puget Sound Power and Light Company, a corporation, agreed that the matters and amounts of damages which are at issue in this cause are the following:

(a) Cost to remove distribution line located on privately-owned land and operated pursuant to written easement granted by the owners\$73.00

[24]

(b) Cost to remove distribution lines located at date of commencement of condemnation proceedings upon privately-owned land without written easements, but with the consent, either tacit or oral, of the owners..\$268.00

(c) Cost of removing a distribution line presently (at date of commencement of condemnation proceedings) operated on Bile Street pursuant to franchise granted by County Commissioners of King County, Washington\$156.99

(d) Cost to rebuild new line in new location outside of condemnation area to continue

service to customer located without the project
area\$408.98

That by said stipulation, the petitioner and respondent agreed that respondent is entitled to compensation in the sum of Seventy-three Dollars (\$73.00) for its recorded written easement as set forth under (a) above, the cost to remove the distribution line from said easement area being agreed upon as the measure of compensation. That by said stipulation, the respondent contends that it is entitled to compensation as set forth under (b), (c) and (d) above, and the petitioner contends that respondent is not entitled to such compensation. By said stipulation, the petitioner and respondent have agreed upon the sums stated as the measure of compensation in the event it is adjudged that the respondent is entitled to recover compensation.

From the foregoing findings of fact, the Court makes the following:

CONCLUSIONS OF LAW

I.

The Court has jurisdiction of the parties and subject matter herein.

II.

That the respondent, Puget Sound Power and Light Company, a corporation, is entitled to recover fair, just and reasonable compensation for the taking of its recorded written easement in the sum of Seventy-three Dollars (\$73.00) as stipulated to by the petitioner and respondent. [25]

III.

That the respondent, Puget Sound Power and Light Company, a corporation, is entitled to recover fair, just and reasonable compensation in the sum of Four Hundred Eight and 98/100 Dollars (\$408.98) for being put to the burden and expense of rebuilding a new electric power distribution line outside of the area condemned to continue service to a customer located outside the area condemned, said respondent having formerly served said customer by its electric power distribution line operated in a public street under franchise.

IV.

That said respondent, Puget Sound Power and Light Company, a corporation, is not entitled to recover any compensation for its expense in the sum of Two Hundred Sixty-eight Dollars (\$268.00) in removing its electric power distribution lines from privately-owned land where it maintained said lines by tacit or oral consent of the owners of said land.

V.

That said respondent, Puget Sound Power and Light Company, a corporation, is not entitled to recover any compensation for its expense in the sum of One Hundred Fifty-six and 99/100 Dollars (\$156.99) in removing its electric power distribution poles and lines from a public street where said poles and lines were being operated under franchise.

VI.

That the payment of the aforesaid sum of Sev-

enty-three Dollars (\$73.00), without interest, and the payment of the aforesaid sum of Four Hundred Eight and 98/100 Dollars (\$408.98), together with interest thereon at the rate of six percent (6%) per annum from January 22, 1943, until paid into the Registry of the Court, shall constitute full payment of all claims against the United States of [26] America and the final award of just compensation in favor of the said respondent, Puget Sound Power and Light Company, a corporation, in connection with this cause.

Petitioner excepts to the making of Conclusion of Law, No. III, and its exception is allowed.

Respondent, Puget Sound Power and Light Company, a corporation, excepts to the making of Conclusions of Law, No. IV and No. V, and its exception is allowed.

Done In Open Court this 28 day of August, 1943.

CHARLES H. LEAVY

United States District Judge

Presented by:

HAROLD W. ANDERSON

Special Attorney

Department of Justice

[Endorsed]: Lodged in the United States District Court, Western District of Washington, North-Northern Division. Aug. 25, 1943. Judson W. Clerk. By M. Miller, Deputy.

[Endorsed]: Filed in the United States District Court, Western District of Washington, Northern Division, Sep. 2, 1943. Judson W. Shorett, Clerk. By H. M. White, Deputy. [27]

In the District Court of the United States for the
Western District of Washington, Northern Di-
vision

No. 530

UNITED STATES OF AMERICA,

Petitioner,

vs.

CERTAIN PARCELS OF LAND IN RENTON,
COUNTY OF KING, STATE OF WASH-
INGTON; MIKE N. SARGENT, et ux, et al.,
PUGET SOUND POWER AND LIGHT COM-
PANY, a corporation,

Respondents.

JUDGMENT AWARDING COMPENSATION
DIRECTING FUNDS TO BE PAID BY
THE CLERK AND FOR A DEFICIENCY
JUDGMENT

This cause coming on for trial the 30th day of June, 1943, as to certain claims for compensation of the respondent, Puget Sound Power and Light Company, a corporation; the petitioner, United States of America, being represented by F. P. Keenan, Special Assistant to the Attorney General, and Harold W. Anderson, Special Attorney, Department of Justice; the respondent, Puget Sound Power and Light Company, being represented by Holman, Sprague and Allen, and Emory E. Hess, its attorneys; a jury having been waived on motion of the petitioner and said respondent, and the Court

having considered the stipulation of the parties and the records and files herein, and having heard and considered the arguments of counsel, and being fully advised in the premises, and the Court having heretofore made its findings of fact and conclusions of law.

Now, Therefore, It Is Hereby Ordered, Adjudged and Decreed that respondent, Puget Sound Power and Light Company, a corporation, have and recover judgment against the petitioner herein in the sum of Seventy-three Dollars (\$73.00), without interest, as fair, just and reasonable compensation for the taking of said respondent's property consisting of a recorded written easement, of which sum the Clerk of this Court is hereby directed to pay to Puget Sound Power and Light Company, a corporation, the sum of Eight Dollars [28](\$8.00) each out of the deposits of estimated just compensation heretofore made and now remaining in the Registry of the Court for Parcel 32 and Parcel 34, which said parcels were encumbered with said easement, and a deficiency judgment is hereby entered against the petitioner herein in the sum of Fifty-seven Dollars (\$57.00), said deficiency judgment being included in said Seventy-three Dollar (\$73.00) judgment, and

It Is Further Ordered, Adjudged and Decreed that respondent, Puget Sound Power and Light Company, a corporation, have and recover judgment against petitioner herein in the sum of Four Hundred Eight and 98/100 Dollars (\$408.98), together with interest thereon at the rate of six per-

cent (6%) per annum from January 22, 1943, until paid into the Registry of this Court.

To the entry of judgment in favor of the respondent, Puget Sound Power and Light Company, in the sum of Four Hundred Eight and 98/100 Dollars (\$408.98), the petitioner excepts and said exception is allowed.

To the refusal of the Court to enter judgment in its favor in the additional sums of Two Hundred Sixty-eight Dollars (\$268.00) and One Hundred Fifty-six and 99/100 Dollars (\$156.99), the respondent, Puget Sound Power and Light Company, a corporation, excepts and said exception is allowed.

Done in Open Court this 28 day of August, 1943.

CHARLES H. LEAVY

United States District Judge

Presented by:

HAROLD W. ANDERSON

Special Attorney Department of Justice

[Endorsed]: Lodged in the United States District Court, Western District of Washington, Northern Division. Aug. 25 1943. Judson W. Shorett, Clerk. By M. Miller, Deputy.

[Endorsed]: Filed in the United States District Court, Western District of Washington, Northern Division. Sep. 2, 1943. Judson W. Shorett, Clerk. By H. M. White, Deputy. [29]

[Title of District Court and Cause.]

NOTICE OF APPEAL

To the Clerk of the District Court of the United States for the Western District of Washington, Northern Division, and

To Puget Sound Power and Light Company, a corporation, and Holman, Sprague and Allen and Emory E. Hess, its attorneys:

Notice Is Hereby Given that the United States of America, petitioner in the above-entitled action, hereby appeals to the United States Circuit Court of Appeals for the Ninth Circuit from that portion of the judgment designated as "Judgment Awarding Compensation Directing Funds to be Paid by the Clerk and for a Deficiency Judgment" signed by the Court on August 28, 1943, and entered September 2, 1943, in the above entitled action, which awarded judgment to the respondent, Puget Sound Power and Light Company, a corporation, in the sum of Four Hundred Eight and 98/100 Dollars (\$408.98), together with interest thereon.

Dated at Seattle, Washington, this 13th day of
November, 1943

NORMAN M. LITTELL

Assistant Attorney General

F. P. KEENAN

Special Assistant to the At-
torney General

HAROLD W. ANDERSON

Special Attorney Department
ment of Justice

Attorneys for the United
States of America

Office and Post Office Address:

Department of Justice

Washington 25, D. C.

or

655 Skinner Building

Seattle 1, Washington

[Endorsed]: Filed Nov. 13, 1943. [30]

[Title of District Court and Cause.]

STATEMENT OF POINTS ON APPEAL

1. The District Court erred in rendering that part of the judgment which awarded to the Puget Sound Power and Light Company recovery against the United States in the sum of Four Hundred Eight and 98/100 Dollars (\$408.98) together with interest thereon at the rate of six percent per an-

num from January 22, 1943, until paid into the Registry of the Court.

2. The District Court erred in holding that as to the cost to rebuild new line in new location outside the condemnation area to continue service to a customer located outside the condemnation area the Puget Sound Power and Light Company was entitled to recover from the United States, whether such recovery be rested upon grounds of taking of property, taking of franchise, relocation damages, loss of franchise, severance damages or on the provision of the constitution of the State of Washington (Article 1, Section 16) here inapplicable [31] which requires compensation for property "taken or damaged."

NORMAN M. LITTELL

Assistant Attorney General

FRANK P. KEENAN

Special Assistant to the At-
torney General

Seattle, Washington

VERNON L. WILKINSON

Attorney, Department of Jus-
tice,

Washington, D. C.

LAWRENCE VOLD

Attorney, Department of Jus-
tice,

Washington, D. C.

Received Dec. 11, 1943

HOLMAN, SPRAGUE & ALLEN

[Endorsed]: Filed Dec. 11, 1943. [32]

[Title of District Court and Cause.]

DESIGNATION OF THE CONTENTS OF THE
RECORD ON APPEAL

Comes now the United States of America, appellant in the above entitled case, and designates the following for inclusion in the record on appeal:

1. The petition filed June 16, 1942, omitting from the title of the same the enumeration of the many individual defendants listed between the name Mike N. Sargent, near the beginning, and the name City of Renton, near the end of this long list of defendants; also omitting from the paragraph numbered VI of the petition the particularized description of the property taken; also omitting the attached exhibits.

2. The declaration of taking filed June 16, 1942.

3. That portion of Schedule "A" attached to the declaration of taking which begins with description of Parcel 45 and including therein from that point to the end of Schedule "A".

4. The notice and summons filed January 22, 1943, omitting therefrom the names of all named defendants except Puget Sound Power and Light Company and omitting also all of the detailed description of the property. [33]

5. The appearance and answer of the Puget Sound Power and Light Company filed April 26, 1943.

6. Stipulation filed June 30, 1943, together with the map attached thereto which is marked Exhibit "A" and referred to therein.

7. Petitioner's motion for new trial, filed July 2, 1943, and journal entry of August 16, 1943, showing denial thereof.

8. Findings of fact and conclusions of law filed September 2, 1943.

9. Judgment filed September 2, 1943.

10. Notice of appeal with its date of filing, filed November 13, 1943.

11. The statement of points on which appellant intends to rely.

12. This designation of the contents of the record on appeal.

Respectfully submitted,

NORMAN M. LITTELL

Assistant Attorney General

FRANK P. KEENAN

Special Assistant to the At-
torney General

Seattle, Washington

VERNON L. WILKINSON

Attorney, Department of Jus-
tice,

Washington, D. C.

LAWRENCE VOLD

Attorney, Department of Jus-
tice,

Washington, D. C.

Received Dec. 11, 1943.

HOLMAN, SPRAGUE & ALLEN

[Endorsed]: Filed Dec. 11, 1943. [34]

[Title of District Court and Cause.]

CERTIFICATE OF CLERK TO TRANSCRIPT
OF RECORD ON APPEAL

United States of America,
Western District of Washington—ss.

I, Judson W. Shorett, Clerk of the United States District Court for the Western District of Washington, do hereby certify that the foregoing type-written transcript of record, consisting of pages numbered 1 to 34, inclusive, is a full, true and complete copy of so much of the record papers and other proceedings in the above and foregoing entitled cause as is required by Designation of Counsel filed and shown herein, as the same remain of record and on file in the office of the Clerk of said District Court at Seattle, and that the same constitute the record on appeal herein from the judgment of said United States District Court for the Western District of Washington to the United States Circuit Court of Appeals for the Ninth Circuit.

I further certify that the following is a true and correct statement of all expenses, costs, fees and charges incurred in my office for making record, certificate or return to the United States Circuit Court of Appeals for the Ninth Circuit, to wit: [35]

Clerk's fees (Act of February 11, 1925) for making record, certificate or return, 148 folios at 05c.....	\$ 7.40
Appeal fee (Sec. 5 of Act).....	5.00

Puget Sound Power and Light Co. 47

Certificate of Clerk to Transcript of Record.... .50

Total\$12.90

I further certify that the foregoing fees have not been paid to me for the reason that the appeal is being prosecuted by the United States of America.

In witness whereof I have hereunto set my hand and affixed the official seal of said District Court at Seattle, in said District, this 30th day of December, 1943.

JUDSON W. SHORETT,

Clerk

[Seal] By PERCY MADDUX

Deputy [36]

[Endorsed]: No. 10654. United States Circuit Court of Appeals for the Ninth Circuit. United States of America, Appellant, vs. Puget Sound Power and Light Company, a Corporation, Appellee. Transcript of Record. Upon Appeal from the District Court of the United States for the Western District of Washington, Northern Division.

Filed January 4, 1944.

PAUL P. O'BRIEN

Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

In the United States Circuit Court of Appeals for
the Ninth Circuit

No. 10654

UNITED STATES OF AMERICA,

Petitioner,

vs.

CERTAIN PARCELS OF LAND IN RENTON,
KING COUNTY, WASHINGTON, MIKE N.
SARGENT, et al., PUGET SOUND POWER
AND LIGHT COMPANY, a corporation,
Defendants.

CONCISE STATEMENT OF POINTS UPON
WHICH APPELLANT INTENDS TO
RELY ON APPEAL

1. The District Court erred in rendering that part of the judgment which awarded to the Puget Sound Power and Light Company recovery against the United States in the sum of Four Hundred eight and 98/100 Dollars (\$408.98) together with interest thereon at the rate of six percent per annum from January 22, 1943, until paid into the Registry of the Court.

2. The District Court erred in holding that as to the cost to rebuild new line in new location outside the condemnation area to continue service to a customer located outside the condemnation area the Puget Sound Power and Light Company was entitled to recover from the United States, whether such recovery be rested upon grounds of taking of

property, taking of franchise, relocation damages, loss of franchise, severance damages or on the provision of the constitution of the State of Washington (Article 1, Section 16) here inapplicable which requires compensation for property "taken or damaged."

NORMAN M. LITTELL

Assistant Attorney General

F. P. KEENAN

Special Assistant to the At-
torney General

Seattle, Washington

VERNON L. WILKINSON

Attorney, Department of Jus-
tice,

Washington, D. C.

LAWRENCE VOLD

Attorney, Department of Jus-
tice,

Washington, D. C.

[Endorsed]: Filed Jan. 3, 1944. Paul P.
O'Brien, Clerk.

No. 10654

**In the United States Circuit Court of Appeals
for the Ninth Circuit**

UNITED STATES OF AMERICA, APPELLANT

v.

PUGET SOUND POWER AND LIGHT COMPANY,
A CORPORATION, APPELLEE

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES
FOR THE WESTERN DISTRICT OF WASHINGTON, NORTHERN
DIVISION

BRIEF FOR THE UNITED STATES

NORMAN M. LITTELL,
Assistant Attorney General,

FRANK P. KEENAN,
*Special Assistant to the Attorney General,
Seattle, Washington.*

VERNON L. WILKINSON,
LAWRENCE VOLD,
*Attorneys, Department of Justice,
Washington, D. C.*

FILED

MAR 23 1944

PAUL R. O'BRIEN

CLERK

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In the United States Circuit Court of Appeals for the Ninth Circuit

No. 10654

UNITED STATES OF AMERICA, APPELLANT

v.

PUGET SOUND POWER AND LIGHT COMPANY, A CORPORATION, APPELLEE

*APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES
FOR THE WESTERN DISTRICT OF WASHINGTON, NORTHERN
DIVISION*

BRIEF FOR THE UNITED STATES

OPINION BELOW

The district court did not write an opinion. Its findings of fact and conclusions of law are found at R. 32-37.

JURISDICTION

This is an appeal from a portion of a condemnation judgment entered September 2, 1943 (R. 38-40). Notice of appeal was filed November 13, 1943 (R. 41-42). The jurisdiction of the district court was invoked under the General Condemnation Act of August 1, 1888, 25 Stat. 357, 40 U. S. C. sec. 257; the Declaration of Taking Act of February 26, 1931, 46 Stat. 1421, 40 U. S. C. secs. 258 (a) to 258 (e);

the Lanham Act of October 14, 1940, 54 Stat. 1125, as amended; and the Appropriation Act of May 24, 1941, 55 Stat. 197. The jurisdiction of this Court is invoked under section 128 of the Judicial Code as amended, 28 U. S. C. sec. 225 (a).

QUESTION PRESENTED

Whether the United States, when it condemns the fee title to land traversed by a public road on which Puget Sound Electric Light and Power Company maintained an electric transmission line pursuant to a county franchise, is liable for the \$408.98 expended by the company in relocating its lines so that it could continue to serve a customer located outside of the area condemned.

STATEMENT

The United States on June 16, 1942, instituted condemnation proceedings, accompanied by declaration of taking, to acquire certain lands in Renton, King County, Washington, to provide housing for persons engaged in national defense activities (R. 2-19). The interest thus taken was "the full fee simple title" (R. 5, 12, 13, 16, 23), including certain streets and county roads described as follows: "Public Streets: All those portions of * * * Bile Street * * * within the area of the project site" (R. 19).

Because of these condemnation proceedings the Puget Sound Power and Light Company removed its poles and lines from the privately owned lands, and from the streets and roads within the area condemned. It rebuilt elsewhere a line which it had previously operated on Bile Street so as to continue serving a

former customer located outside of the project area (R. 34, 36; Exhibit A, R. 30). The company asserted in its answer that "the property and franchise rights of this respondent will be interfered with and taken or damaged and by reason of the taking thereof its remaining electric public utility system will suffer damage; nothing has been paid to this respondent on account thereof or deposited in the registry of this court as compensation therefor" (R. 25-26). The amount and nature of these claims were more specifically set forth in a stipulation signed by the parties and filed in court on June 30, 1943 (R. 27-29), wherein the claims were itemized as follows:

(a) Cost to remove distribution line located on privately-owned land and operated pursuant to written easement granted by the owners, \$73.00.

(b) Cost to remove distribution lines located at date of commencement of condemnation proceedings upon privately-owned land without written easements, but with the consent, either tacit or oral, of the owners, \$268.00.

(c) Cost of removing a distribution line presently (at date of commencement of condemnation proceedings) operated on Bile Street pursuant to franchise granted by the County Commissioners of King County, Washington, \$156.99.

(d) Cost to rebuild new line in new location outside of condemnation area to continue service to customer located without the project area, \$408.98.

The Government conceded that the company could recover for item (a)—the cost of removing transmission lines located on privately owned land pursuant

to a written easement (R. 28, 35). It contended that the other three items were not compensable. The trial court agreed that items (b) and (c)—the cost of removing lines maintained across privately owned lands under a tacit or oral license and along streets and highways pursuant to a franchise—were not recoverable (R. 36). It held the Government liable, however, for item (d)—the \$408.98 expended by the company in rebuilding a new line outside of the area condemned so that it could continue to serve a customer previously served by the line maintained on Bile Street pursuant to the company's franchise from the county (R. 34, 35; Exhibit A, R. 30).

The question thus decided being one which is constantly recurring, the present appeal was taken (R. 41) so that an authoritative decision could be obtained.

SPECIFICATIONS OF ERROR

1. The district court erred in rendering that part of the judgment which awarded to the Puget Sound Power and Light Company recovery against the United States in the sum of Four Hundred Eight and 98/100 Dollars (\$408.98) together with interest thereon at the rate of six per cent per annum from January 22, 1943, until paid into the registry of the court.

2. The district court erred in holding that as to the cost to rebuild new line in new location outside the condemnation area to continue service to a customer located outside the condemnation area the Puget Sound Power and Light Company was entitled to recover from the United States, whether such recovery be rested upon grounds of taking of property, taking

of franchise, relocation damages, loss of franchise, severance damages or on the provision of the constitution of the State of Washington (Art. 1, sec. 16) here inapplicable which requires compensation for property "taken or damaged."

ARGUMENT

The Puget Sound Power and Light Company maintained transmission lines and poles within the area condemned under three types of authority—in one instance across privately owned land by virtue of a written easement granted by the owner; in other instances across privately owned land by virtue of the tacit or oral consent of the landowners; and in a third instance along Bile Street by virtue of a franchise granted by King County (R. 28, 33, 34-36; Exhibit A, R. 30).

Where the company had a written easement, an actual interest in land, it was of course entitled to compensation for the value of the interest taken. Accordingly, recovery was had for item (a) (R. 29, 35). Whether the value of that interest was properly arrived at on the basis of the cost of removing existing transmission lines and poles is quite debatable but that issue is not involved here.

In those instances where the company maintained transmission lines across privately owned lands with only the tacit or oral consent of the landowners, it had no interest in the lands taken and was accordingly not entitled to any compensation for costs incurred in removing the poles and lines from the lands condemned (*Potomac Electric Power Co. v.*

United States, 85 F. 2d 243 (App. D. C. 1936), certiorari denied 299 U. S. 565).

In the third situation the court held, and we think quite properly, that the company was not entitled to recover expenditures incurred in removing lines and poles maintained along a public street pursuant to the franchise granted by King County—item (c) (R. 36). It did, however, hold, and we think erroneously, that the company was entitled to recover expenditures (item d) incurred in “rebuilding a new electric power distribution line outside of the area condemned to continue service to a customer located outside the area condemned, *said respondent having formerly served said customer by its electric power distribution line operated in a public street under franchise*” (R. 36; cf. R. 34). Thus it will be seen, and the fact should be carefully noted, that the relocation expenditures which were incurred by appellee resulted from the taking of Bile Street and not from the taking of appellee’s written easement across privately owned lands. In other words, the customer in question was formerly served by the line operated along Bile Street and not by the transmission line across private property, a fact made clear by the court’s findings and conclusion and by Exhibit A (R. 34, 36, 30). If the customer had been formerly served by the line maintained across privately owned land under a written easement, it is arguable that the value of that easement would have been determined on the basis of what it cost the company to provide a substitute easement (*United States v. Wheeler Township*, 66 F. 2d 977 (C. C. A. 8, 1933)).

But in the instant case, as the court's findings make plain, the expenditures were incurred because of the closing of Bile Street and the termination of the company's right to maintain its lines along that street. Such expenditures are not recoverable: (1) Because the franchise from King County did not confer on the appellee any property rights in Bile Street; and (2) because consequential damages including losses resulting from the frustration of private contracts are not compensable under the Fifth Amendment.

I

The franchise from King County did not confer on the appellee any property rights in Bile Street

Though the exact terms in which it is described in judicial opinions may vary, it is well settled that a utility company's franchise to maintain its structures and conduct its operations in the public highway is not an interest in land. It is merely a privilege of sharing in the use of a public highway easement; it is not a grant of a property interest in any particular portion of the highway. Such a franchise is merely "a *license* * * * to share in a public easement." 1 Nichols, *Eminent Domain* (2d ed. 1917), sec. 127. It "is in its nature but a *permit* to use the streets of the municipality in a particular way for a particular purpose" (*Wood v. City of Seattle*, 23 Wash. 1, 62 Pac. 135, 140 (1900); see *Washington Water Power Co. v. Rooney*, 3 Wash. 2d 642, 101 P. 2d 580, 583 (1940)). It has been described as a "mere *privilege* * * * to occupy a street along with other

travelers * * *” (*In re City of Seattle*, 49 Wash. 109, 94 Pac. 1075, 1079 (1908)). “The rights in the streets which are so exercised or enjoyed are *not private rights of property*, but are a part of the public rights which are shared in common, although used and enjoyed in different ways by the different members of the public who pass through a street or where property is carried through it” (*New England Tel. & Tel. Co. v. Boston Terminal Co.*, 182 Mass. 397, 65 N. E. 835, 836 (1903)).¹ Even in a jurisdiction where the fee title to the streets is in the public,² it has been held that a franchise or permit to a power company “to lay their conduits, cables, and wires conveyed no estate in the streets and alleys. The permission granted amounted to a mere license, revocable at will,³ to use

¹ Somewhat similarly, a contract by one railroad company granting to another railroad company in exchange for certain money payments the right to share the use of its railroad tracks by operating trains thereon, the owning railroad company remaining in control of the tracks and responsible for their upkeep, has been held neither to create any estate or interest in the railroad right-of-way nor to confer any right to share in the distribution of proceeds of condemnation of a flowage easement over a portion of its length (*Chicago, M. St. P. & P. R. Co. v. Chicago, R. I. & P. Ry Co.*, 138 F. 2d. 268 (1943), certiorari denied January 10, 1944).

² In the state of Washington, as in most states, the public has only an easement of use in a public street or highway, the underlying fee being in the abutting owners (*Bradley v. Spokane & I. E. R. Ry.*, 79 Wash. 955, 140 Pac. 688, 689 (1914)).

³ The Washington Constitution forbids the granting of an irrevocable or exclusive franchise to a private utility. Wash. Const., Art. I, secs. 8 and 12; Art. 12, sec. 1. Even in the case of an irrevocable franchise to a gas company, the Supreme Court has said that the “company did not acquire any specific location in the streets; it was content with the general right to use them and when

the streets and alleys for certain purposes" (*Potomac Electric Power Co. v. United States*, 85 F. 2d 243, 248 (App. D. C. 1936), certiorari denied 299 U. S. 565).

The provisions of statutes or ordinances granting a franchise to share in the use of a public highway, it has been cogently explained, "are merely provisions for the regulation of the different public rights in the streets. *None of them purports to convey private rights of property*" (*New Eng. Tel. & Tel. Co. of Mass. v. Boston Terminal Co.*, 182 Mass. 397, 461, 65 N. E. 835, 836 (1913)).

Such a franchise to share in the use of a public highway easement thus is roughly comparable not to an easement in a highway but to a license or permit to peddle goods on the city streets or to operate a truck on a public highway. "Any member of the public conveying his products to his customers had the same right to use the alley that appellant utility company had * * *. No doubt other users of the alley found it convenient to use the alley and suffered some inconvenience by having to convey their commodities by some other route and no doubt appellant suffered some inconveniences by having to convey its commodity by some other route, and for that purpose to remove its apparatus and install it elsewhere. But for such damages the public users, including appellant, may not recover. Appellant imposed no additional

it located its pipes it was at the risk that they might be at some future time disturbed when the State might require for a necessary public use that changes in the location be made" (*New Orleans Gas Light Co. v. Drainage Com. of New Orleans*, 197 U. S. 453, 461 (1905)).

burden upon the fee,⁴ paid nothing for its privileges, and certainly should not be entitled to recover for the loss thereof by reason of the vacation of the alley” (*Northern Indiana Gas & Elec. Co. v. Merchants Imp. Assn.*, 87 Ind. App. 74, 160 N. E. 50, 32 (1928)).

Thus a franchise without more confers on a utility company no property rights in the street itself. It follows, therefore, that when the United States condemned the absolute fee in Bile Street—the county’s highway easement and the underlying fee held by the abutting landowners—it did not take any land or interest in land belonging to the appellee. The company’s poles and transmission lines were not taken. Under Washington law they continued to be regarded as personalty and had to be removed by the licensee at his own expense (*Dunsmuir v. Pt. Angeles Gas, Water El. Lt. & R. Co.*, 24 Wash. 104, 63 Pac. 1095 (1901); *Potomac Electric Power Co. v. United States*, 85 F. 2d 243 (App. D. C. 1936), certiorari denied 299

⁴ Under the line of authority followed in the state of Washington it is well settled that a franchise to maintain an electric transmission line in a public highway involves no added burden to the highway easement for which abutting property owners are entitled to compensation (*McCullough v. Interstate Power & Light Co.*, 163 Wash. 147, 300 Pac. 165 (1931) (electric power line); *Brandt v. Spokane & Inland Empire R. Co.*, 78 Wash. 214, 138 Pac. 871 (1914) (power line to service electric powered street railway); cf. *New England Tel. & Tel. Co. of Mass. v. Boston Terminal Co.*, 182 Mass. 397, 65 N. E. 835 (1913) (dictum); *Cater v. Northwestern Tel. Exch. Co.*, 60 Minn. 593, 63 N. W. 111 (1895) (telephone line); *Lay v. State Rural Electrification Authority*, 182 S. C. 32, 188 S. E. 368 (1936) (electric power line); *Frazier v. East Tennessee Tel. Co.*, 115 Tenn. 416, 90 S. W. 620 (1906) (telephone line)).

U. S. 565). The court below so held, disallowing item (c) (R. 34, 36) from which no appeal has been taken. Thus, it will be seen that the Government in condemning Bile Street has not taken any real property belonging to the appellee. Nor has it taken the company's franchise.⁵ The Government has at most frustrated the license, permit, or contract—call it what one will—which the county had granted to the appellee. The Government, for reasons now to be stated, submits that such losses are not compensable.

⁵ In *Monongahela Navigation Co. v. United States*, 148 U. S. 312 (1893) where the Government continued to operate locks which the company placed in the Monongahela River pursuant to its franchise, it was thought that the Government had taken the franchise. Cf. *Puget Sound Power & Light Co. v. Puyallup*, 51 F. 2d 688 (C. C. A. 9, 1931). In the instant case, if the Government had gone into the utility business and supplied defense workers with electricity by means of appellee's lines and poles in Bile Street, it might be argued on the basis of the *Monongahela* case that the Government had appropriated the franchise and that compensation was due therefor. Such is not this case. The lines and poles are not being used by the United States; they have been completely removed. Furthermore, the correctness of the *Monongahela* case on this point is open to question. The Supreme Court has several times made it plain that the *Monongahela* decision rests on estoppel principles, the original locks having been constructed by the private company there involved at the invitation of Congress (*United States ex rel. T. V. A. v. Powelson*, 319 U. S. 266, 281 (1943); *Omnia Co. v. United States*, 261 U. S. 502, 513-514). Ordinarily when the Government condemns a going business "lock, stock and barrel," it does not take the corporate franchise or charter. So far as the federal taking is concerned, the company can move elsewhere and commence anew. The federal Government is not dependent upon local franchises when it chooses to exercise its federal powers within the limits of a particular state, and therefore has no need of the franchise (*Oklahoma City v. Saunders*, 94 F. 2d 323 (C. C. A. 10, 1938)).

II

Consequential damages including losses resulting from the frustration of private contracts are not compensable under the Fifth Amendment

The amount of compensation to which appellee is entitled is determined by the requirement of the Fifth Amendment that just compensation be paid for private property *taken* for public use. What is just compensation is a federal matter (*United States v. Miller*, 317 U. S. 369, 379-380 (1943)). Generally recovery has been limited in the federal courts to the fair cash market value of the property actually taken (*United States v. Miller*, 317 U. S. 369, 374 (1943)). While the statement has sometimes been made that the owner is entitled to be put in as good a position pecuniarily as if his property had not been taken,⁶ this does not mean that all losses suffered by the owner are compensable under the Fifth Amendment (*United States ex rel. T. V. A. v. Powelson*, 319 U. S. 266, 285 (1943)). As Mr. Justice Brewer pointed out in *Monongahela Navigat'n Co. v. United States*, 148 U. S. 312, 326 (1893)) :

* * * just compensation * * * is for the property, and not to the owner. Every other clause in this Fifth Amendment is personal. "No person shall be held to answer for a capital, or otherwise infamous crime," etc. Instead of continuing that form of statement, and saying that no person shall be deprived of his property without just compensation, the personal element is left out, and the "just compensation" is to be a full equivalent *for the property taken*.

⁶ E. g., *Seaboard Air Line Ry. v. United States*, 261 U. S. 299, 304 (1923).

The United States is required to "pay only for what it takes, not for opportunities which the owner may lose" (*United States ex rel. T. V. A. v. Powellson*, 319 U. S. 266, 282 (1943)). "There are numerous business losses which result from condemnation of properties but which are not compensable under the Fifth Amendment" (p. 281). "Injury to a business carried on upon lands taken for public use * * * does not constitute an element of just compensation" (*Joslin Co. v. Providence*, 262 U. S. 668, 675 (1923)). Thus, in *Mitchell v. United States*, 267 U. S. 341, 345 (1925), the owner was denied compensation for the destruction of his business which resulted in the taking of his land for a public project even though the business could not be reestablished elsewhere. "If the business was destroyed, the destruction was an unintended incident of the taking of the land" (p. 345). Similarly, and for substantially the same reasons, a utility's loss of customers through the Government's taking and vacating the customer's property which was serviced by the utility is not compensable (*Deepe v. United States*, 103 Colo. 294, 86 P. 2d 242 (1938) (telephone company); *Fix v. City of Tacoma*, 171 Wash. 196, 17 P. 2d 599 (water company)). Analogously no compensation can be awarded for the cost of readjusting an irrigation service by inclusion of new land in the same amount as that condemned and construction of new ditches in order to continue the service in conditions similar to those prior to the taking (*People of Puerto Rico on behalf of the Isabela Irrigation Service v. United States*, 134 F. 2d 267 (C. C. A. 1,

1943), certiorari denied October 11, 1943). Likewise, a mere interference with private contract rights involving property taken are not compensable although resulting in a pecuniary loss to the owner. "Frustration and appropriation are essentially different things" (*Omnia Co. v. United States*, 261 U. S. 502, 508-513 (1923); *Mullen Benevolent Corporation v. United States*, 290 U. S. 89 (1933); *United States ex rel. T. V. A. v. Powelson*, 319 U. S. 266, 282 (1943)). And it will be recalled that the owner in the *Miller* case was not left in as good a position pecuniarily as if his property had not been taken since he was not permitted to recover the increment in value caused by the government project, an increment enjoyed by his neighbors whose lands were not taken.

Among the losses most frequently held to be non-compensable is the removal and relocation expenses incurred by the owner in moving personal property or a business from the premises condemned and reestablishing it elsewhere (*Joslin Co. v. Providence*, 262 U. S. 668, 675-676 (1923); *Potomac Electric Power Co. v. United States*, 85 F. 2d 243, 249 (App. D. C. 1936); certiorari denied 299 U. S. 565 (1936); *Futrovsky v. United States*, 66 F. 2d 215, 216-217 (App. D. C. 1933); cf. *Mitchell v. United States*, 267 U. S. 341, 345 (1925); *Bothwell v. United States*, 254 U. S. 231 (1920)).

Likewise, attempts by a lessee to recover removal and relocation expenses in condemnation proceedings have been rejected repeatedly by the courts (*Gershon Bros. Co. v. United States*, 284 Fed. 849 (C. C. A. 5,

1922); *United States v. Meyers*, 190 Fed. 688 (Conn. 1911); *County of Los Angeles v. Signal R. Co.*, 86 Cal. App. 704, 710-712, 261 Pac. 536 (1927); *Mayor & C. C. of Balto. v. Gamse*, 132 Md. 290, 296-297, 104 Atl. 429 (1918); *Springfield S. W. R. Co. v. Schweitzer*, 173 Mo. App. 650, 655, 158 S. W. 1058 (1913); *St. Louis v. St. Louis I. M. & S. R. Co.*, 266 Mo. 694, 707, 182 S. W. 750 (1916); *Ranlet v. Railroad*, 62 N. H. 561, 564 (1883); *Matter of New York W. S. & B. R. Co.*, 35 Hun. 633 (N. Y. 1885); *Fiorini v. Kenosha*, 208 Wis. 496, 499, 243 N. W. 761 (1932); but see *General Motors v. United States* (C. C. A. 7, decided February 11, 1944). Such damages like other consequential damages have no bearing upon the value of the property taken. In short, the condemnee is made pecuniarily whole when he is paid the fair market value of the property taken.

It is true that a number of state constitutions and statutes provide that property shall neither be taken nor *damaged* without compensation. Among these are Washington, which permits the landowner to recover damages for the interruption of his business or injuries thereto. (Wash. Const., Art. I, sec. 16; *Great Northern Railway Co. v. Seattle*, 180 Wash. 368, 39 P. 2d 999 (1935); cf. *Seattle v. Columbia & Puget Sound R. R. Co.*, 6 Wash. 379, 390, 393, 33 Pac. 1048 (1893); *Belleville v. St. Clair County Turnpike Co.*, 234 Ill. 428, 84 N. E. 1049 (1908)). But the Fifth Amendment, as we have seen (*supra*, pp. 12-13), has never been so enlarged. (*Mitchell v. United States*, 267 U. S. 341, 345-346 (1925); *Futrovsky v. United States*, 66 F. 2d 215, 217 (App. D. C. 1933)). And

any state rule of damages, evidentiary or otherwise, which would increase the compensation provided for by the Federal Constitution is in no way applicable in a federal condemnation proceeding (*United States v. Miller*, 317 U. S. 369, 379-380 (1943); *United States v. Alcorn*, 80 F. 2d 487, 489 (C. C. A. 9, 1936); *United States v. 251.81 acres of land in Meade County, Ky.*, 50 F. Supp. 81 (W. D. Ky. 1943); *United States v. Indian Creek Marble Co.*, 40 F. Supp. 811, 818, 819 (E. D. Tenn. 1941); *United States v. Crary*, 2 F. Supp. 870 (W. D. Va. 1932)). There being no statutory mandate by Congress to the contrary, the federal government pays "only for what it takes," and not for business losses which the condemnee may suffer by reason of frustrated contracts, the necessity of reestablishing his business elsewhere, etc. (*United States ex rel. T. V. A. v. Powelson*, 319 U. S. 266, 282 (1943)).

In the instant case the district court correctly applied the foregoing principles in disallowing items (b) and (c). These same principles likewise require the disallowance of item (d). As we have seen (*supra*, p. 7), appellee had no property rights in Bile Street itself. By virtue of its franchise from King County it had simply a contract right to maintain its lines and poles in the street so long as the street remained a public thoroughfare. When the Government condemned the area in question, it frustrated the continued exercise of that contract right. Scores of similar situations may be readily envisaged. For example, a coal mining company may contract to supply a manufacturer with a specified quantity of coal

annually. The Government requisitions or condemns the coal mine. The manufacturer's contract right is frustrated but not appropriated by the Government (*Omnia Co. v. United States*, 261 U. S. 502 (1923)). The manufacturer may have to pay more for coal from some other company but he has no claim against the Government. What right, if any, he may have against the coal company will depend upon the terms of his contract. Similarly, the Government may condemn a power company or requisition its entire output of electrical energy for war plants. Contracts with other customers are thus frustrated but these customers are not entitled to recover any compensation from the United States for attendant losses. Finally, a school, irrigation or reclamation district may issue bonds to provide improvements, the bonds to be payable by assessments to be levied for the next twenty years against lands within the district. The Government condemns all lands within the district for an air base or other public purpose, the lands thus becoming nontaxable. The bondholders, except to the extent that their bonds have become actual liens against the land, have no recourse against the United States (*Mullen Benevolent Co. v. United States*, 290 U. S. 89 (1933); *People of Puerto Rico on behalf of the Isabela Irrigation Service v. United States*, 134 F. 2d 267 (C. C. A. 1, 1943), certiorari denied October 11, 1943).

Those cases present a situation analogous to that here involved. The bondholders in the *Mullen Benevolent* case had no property rights in the land there condemned; the company here had no property rights

in Bile Street itself. The bondholders were depending on certain lands remaining in private ownership so as to supply the revenues to satisfy the bonds; the company here was depending on the continued retention by King County of a highway easement in Bile Street. In both instances the condemnation by the United States frustrated contractual arrangements. The damages thus suffered were consequential and not compensable in the *Mullen Benevolent* case. They are likewise not compensable here. "The streets were public streets * * * and loss sustained by their closing is consequential" (*Mt. Vernon A. & W. Ry. Co. v. United States*, 75 C. Cls. 704, 708 (1932)).

Nor can damages be recovered on any severance theory inasmuch as appellee had no property rights in Bile Street. Severance damages are not recoverable when the injury claimed grows out of a frustration of intangible rights which does not involve the taking of physical property. Even "as respects other property of the owner consisting of separate tracts adjoining that affected by the taking, the Constitution has never been construed as requiring payment of consequential damages" (*United States v. Miller*, 317 U. S. 369, 376 (1943); cf. *Sharpe v. United States*, 112 Fed. 893 (C. C. A. 3, 1902), affirmed 191 U. S. 341 (1903)).

The rule allowing recovery of compensation for severance damages cannot be made applicable to the facts in the present case. None of the power company's physical property was taken. It merely had to remove its poles and lines (personalty) from the privately owned lands and the public highways within

the project area (R. 33-34). The claim here in controversy did not arise out of the taking of the power company's easement over privately owned land (R. 28) for which judgment in the sum of \$73.00 has been entered (R. 39), and from which no appeal has been taken. The claim here in controversy arose out of the frustration of the power company's franchise to share in the use of the public highway easement. The only physical item "severed" in this connection was not the power company's physical property but its customer. Loss of customers, however, resulting from proper exercise of the power of eminent domain is consequential damage which is not compensable (*Deepe v. United States*, 103 Colo. 294, 86 F. 2d 242 (1938); *Fix v. City of Tacoma*, 171 Wash. 196, 17 P. 2d 599 (1933)). Loss of future profit or earning power in a business even from a taking by condemnation of some of the physical property used in the business, if without other showing of injury to the physical property retained, does not bring the case within the rule of severance damages (*Mitchell v. United States*, 267 U. S. 341, 343, 345 (1925); *New York & Baltimore Trans. Line v. United States*, 67 C. Cls. 491, 505 (1929); *United States v. Inlots*, 26 Fed. Cas. 490, 496, Cas. No. 14,441a (S. D. Ohio, 1873); *Kennebec Water District v. Waterville*, 97 Me. 185, 212, 54 Atl. 6 (1902); *Oakland v. Pacific Coast Lumber & Mill Co.*, 171 Calif. 392, 153 Pac. 705, 707 (1915)).

CONCLUSION

For the foregoing reasons it is respectfully submitted that the district court erred in awarding the ap-

pellee \$408.98, together with interest, for the expenses which it incurred in rebuilding a transmission line which it formerly operated on Bile Street under a franchise from King County. Any allowance for such expenditures should be stricken from the judgment, and the judgment as so modified should be affirmed.

NORMAN M. LITTELL,
Assistant Attorney General,

FRANK P. KEENAN,
Special Assistant to the Attorney General,
Seattle, Washington.

VERNON L. WILKINSON,
LAWRENCE VOLD,
Attorneys, Department of Justice,
Washington, D. C.

MARCH 1944.

IN THE
UNITED STATES
CIRCUIT COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, *Appellant*,
vs.

PUGET SOUND POWER & LIGHT COMPANY,
a corporation, *Appellee*.

APPEAL FROM THE DISTRICT COURT OF THE UNITED
STATES FOR THE WESTERN DISTRICT OF WASHINGTON,
NORTHERN DIVISION

BRIEF FOR THE APPELLEE

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PAUL E. MORSE,
CLERK

HOLMAN, SPRAGUE & ALLEN
EMORY E. HESS
Attorneys for Appellee.

1006 Hoge Building,
Seattle 4, Washington.

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HOLMAN, SPRAGUE & ALLEN
EMORY E. HESS
Attorneys for Appellee.

1006 Hoge Building,
Seattle 4, Washington.

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**IN THE
UNITED STATES
CIRCUIT COURT OF APPEALS
FOR THE NINTH CIRCUIT**

<hr/>	}	No. 10654
UNITED STATES OF AMERICA, <i>Appellant</i> ,		
vs.		
PUGET SOUND POWER & LIGHT COMPANY, a corporation, <i>Appellee</i> .		
<hr/>		

APPEAL FROM THE DISTRICT COURT OF THE UNITED
STATES FOR THE WESTERN DISTRICT OF WASHINGTON,
NORTHERN DIVISION

BRIEF FOR THE APPELLEE

QUESTION PRESENTED

For the purpose of this case we may accept the statement of the Government that the question is whether, when the United States condemns an area traversed by a public road on which the appellee maintains an electric distribution line under a franchise, appellee is entitled to recover the cost of rebuilding such line in a new location so as to continue service to a customer located outside the area condemned. The precise question involved is the right of a public utility to recover any compensation whatever in such cases

since the proper measure of compensation is not in issue here. The Government makes no contention that the cost of reconstruction is not the proper measure of compensation in this case if any recovery is to be allowed at all. The appellee has not appealed from the disallowance of other claimed items of damage.

STATEMENT

The statement of the Government (Br. 2, 3) needs to be supplemented only by the following facts: The Company is an electric public utility operating several electric generating plants in western Washington and an extensive interconnected transmission system by means of which it distributes said electricity to the public generally in nineteen counties in the northwestern part of the state (R. 27).

ARGUMENT

I. The Fifth Amendment protects all private property, not merely "interests in land." However designated, franchises are property and are entitled to protection under the Constitution.

The Government contends, first, that the franchise vests in the Company no property rights in Bile Street; and, second, that any damages suffered by the Company are merely "consequential" damages and not recoverable under the Fifth Amendment.

There is but one question, and that is, whether by acceptance of the franchise and action thereunder the company has acquired "private property." If it has,

then the Fifth Amendment requires the payment of compensation, for the amendment is not limited to "interests in land."

Counsel say that a franchise is not "a grant of a property interest in any particular portion of the highway," that it is "a *license* to share in a public easement," "a permit to use the streets," "a mere privilege to occupy a street along with other travelers," "a part of the public rights which are shared in common," that it is not an "estate" in the highway, that it is granted merely as "provisions for the regulation of the different public rights in the street," and, on the basis of *Potomac Electric Power Co. v. United States*, 85 F.(2d) 243 (1936), that it is "a mere license revocable at will" (Br. 7-10).

Depending upon the nature of the particular case and the parties before the court, a franchise has been variously described as suggested by Counsel—but not in any condemnation case. The Government's contention disregards a long line of decisions protecting public utility franchises as property.

"Such a street franchise has been called by various names—an incorporeal hereditament, an interest in land, an easement, a right of way—howsoever designated, it is property."

Louisville v. Cumberland Tel. & Tel. Co.,
224 U.S. 649 (1912).

"That an ordinance granting the right to place and maintain upon the streets of a city poles and wires of such a company is the granting of a property right has been too many times decided

by this court to need more than a reference to some of the later cases.”

Owensboro v. Cumberland Tel. & Tel. Co.,
230 U.S. 58, 65 (1913).

“Whether the interest of appellant is denominated a franchise or an easement, it is a valuable property right, and its destruction would be the taking of property within the constitution. So also the interfering with such an interest may be, *pro tanto*, a taking of property which will entitle the owner to compensation. Private property forbidden by the constitution to be taken or damaged for public use without just compensation is not limited to the tangible subject matter or corpus of the property, but includes the right of user and enjoyment of it.”

City of Belleville v. St. Clair County Turnpike Co., 234 Ill. 428 (1908), 84 N.E. 1049.

See also:

Monongahela Navigation Co. v. United States, 148 U.S. 312 (1893);

Los Angeles v. Los Angeles Gas & Electric Corporation, 251 U.S. 32 (1919).

II. When a franchise is acted upon and equipment is placed in a highway pursuant thereto an “interest in land” is acquired.

“We think the authorities support the contention of respondent * * * that the franchise extended by the constitutional provision to lay pipes and conduits or erect poles and supply the inhabitants of a city with artificial light, is an incorporeal hereditament—is real estate in the nature

of an easement pertaining to the streets of a city in which it is exercisable; that it is inseparably annexed to the soil out of which the profit arises, and has a local situation in the place, and that place only, where the right is actually exercised."

Stockton Gas & Electric Co. v. San Joaquin County, 148 Cal. 313 (1905), 83 Pac. 54, 56.

"The right to occupy the streets with gas mains is a franchise. The actual occupation of them in in that way, pursuant to the franchise, is the acquisition of an easement. You must distinguish between the right to do the thing, and the interest acquired in the soil by the exercise of that right."

Consolidated Gas Co. v. Mayor, etc. of the City of Baltimore, 101 Md. 541 (1905), 61 Atl. 532, 534.

"Bedford's right in Springs Road was as real a property right as a leasehold of the same land, or as an abutting owner's right to access to the street."

Town of Bedford v. United States, 23 F.(2d) 453 (1927), 56 A.L.R. 360.

As between mortgagor and mortgagee the rights under a franchise are sometimes said to be an interest in land and the property held thereunder is classified as real property.

Stearns Lighting & Power Co. v. Central Trust Co., 223 Fed. 962 (1915).

In the foregoing case water pipes were held to be real estate because they were connected with the central plant of the water supply company, which was itself real estate.

Franchise rights constitute an interest in land in the state of Washington.

Commercial Electric Light & Power Company v. Judson, 21 Wash. 49, 55 (1899), 56 Pac. 829.

“Appellant’s rights under its franchise were just as much property rights as if it had owned the title in fee simple to the land occupied by Jackson Street. The right to take or damage such a property right may be acquired only by eminent domain.”

Great Northern Railway Company v. Seattle, 180 Wash. 368 (1935), 39 P.(2d) 999.

Counsel cite to the contrary the case of *Dunsmuir v. Port Angeles Gas, Water, Electric Light & Power Co.*, 24 Wash. 104, 63 Pac. 1095 (Br. 10).

That was a contest between two successive mortgagees of a water system in the city of Port Angeles. When the first mortgage was given pipes had been purchased and were in the possession of the mortgagor, “but only a portion of the main had been laid”; the dam had not been built, and no rights therefor had been acquired. The mortgage itself purported to cover “the following described personal property,” but it was not recorded as a chattel mortgage “in a book kept exclusively for that purpose,” as required by Washington statutes then in force. Later, the principal mains of the plant having in the meantime been permanently connected together and buried in the ground and connected with various buildings in Port Angeles, and water having been turned into the mains, mortgage, which was recorded both as a real estate

another mortgage was placed on the property of the water company. This later mortgage was properly recorded both as a real estate mortgage and as a chattel mortgage. The court held that the first mortgage lost its priority because of the failure to record it as a chattel mortgage, but in so holding the court said:

“No part of the mains and pipes covered by respondent’s mortgage was connected with Frazier’s Creek, or used for the purpose of conveying water, at the time the mortgage was made; and, as the greater portion thereof was neither laid in the ground nor connected together at that time, it can hardly be doubted that at least the unconnected portion, if not the whole, was in fact personal property, and properly so considered by the parties to the mortgage.

* * * * *

“If it (the mortgagor) had been the owner of land and buildings with which its pipes and mains were connected, such pipes and mains would have been deemed a part of the realty in the nature of appurtenances or fixtures, in accordance with the rule laid down in *Appeal of Des Moines Water Co.*, 48 Iowa 324, and *Monroe Water Co. v. Township of Frenchtown*, 98 Mich. 431 (57 N.W. 268).”

Dunsmuir v. Port Angeles Gas, Water, Electric Light & Power Co., 24 Wash. 104, 63 Pac. 1095.

It is clear that the court based its decision primarily on the ground that the pipes had, for the most part, not been laid in the streets when the mortgage was given. The remainder of the court’s discussion as to

the nature of the rights acquired after the pipes were laid in the streets was not necessary to the decision. Actually, the court granted a foreclosure of the second mortgage and as a chattel mortgage. It is significant, also, that the court noted, as shown above, that such property might be deemed real property when connected with the pumping plant and source of water supply. Viewed in that light the taking of a part of the pipes laid in the street would be the taking of real property. It certainly would constitute a severance damage.

In *Fix v. Tacoma*, 171 Wash. 196 (1933), 17 P. (2d) 599, no part of the public highway was condemned. Only land abutting upon the highway was taken, which required removal of water users with consequent loss of revenue to the company. Clearly such a loss would be a business loss consequent upon taking land in which the water company had no interest.

In support of their contention that the franchise creates no interest in land, counsel rely upon *Potomac Electric Power Co. v. United States*, 85 F.(2d) 243 (1936); *Mt. Vernon, Alexandria & Washington Ry. Co. v. United States*, 75 Ct. Cl. 704 (1903); *New England Tel. & Tel. Co. v. Boston Terminal Co.*, 182 Mass. 397 (1903), 65 N.E. 835; and *Northern Indiana Gas & Electric Co. v. Merchants' Improvement Assn.*, 87 Ind. Ap. 74 (1928), 160 N.E. 50.

The first three of these cases are decided upon the basis of the revocable nature of the rights held under the franchise. As to the *New England Tel. & Tel.*

case see *Boston Electric Light Company v. Boston Terminal Co.*, 184 Mass. 566 (1904), 69 N.E. 346. The case at bar does not involve a revocable franchise.

The *Northern Indiana Gas* case adjudicates rights after the alley was vacated by due governmental action. Vacation is clearly distinguishable from condemnation.

III. The right to recover compensation upon condemnation of public highways has been recognized in numerous cases.

(a) When the United States has condemned the public rights represented by public bodies, such as cities, counties, etc., the right to compensation has been recognized.

Town of Nahant v. United States, 136 Fed. 273 (1905), af. 153 Fed. 520;

United States v. Certain Land in the Town of Newcastle, 165 Fed. 783 (1908);

Wayne County v. United States, 53 Ct. Cl. 417 (1920), af. 252 U.S. 574;

Town of Bedford v. United States, 23 F.(2d) 453 (1927), 56 A.L.R. 360;

United States v. Wheeler Township, 66 F. (2d) 977 (1933);

United States v. Certain Parcels of Land in Baltimore, 43 Fed. Supp. 687 (1942);

United States v. Prince William County, 9 F. Supp. 219 (1934), af. 79 F.(2d) 1007, cert. den. 297 U.S. 714;

United States v. Certain Parcels of Land in Spokane, 45 F. Supp. 899 (1942);

United States v. Alderson, 53 F. Supp. 528 (1944).

In the *Nahant* case (136 Fed. 273) the city's water and sewer pipes were permanently severed by the erection of fortifications so that reconnection was made necessary.

In the *Bedford* case (27 F.(2d) 453) new highways were required.

In the other cases cited above, except *Prince William County* (9 F. Supp. 219) and the *Newcastle* case (165 Fed. 783) public roads were taken, and in each case the public right was held to be an easement and the Federal Government was required to pay for both the public right and the improvements laid in the highway for the purpose of travel.

The *Prince William County* case (9 F. Supp. 219) was a suit to quiet title, but the right to compensation was recognized. The *Newcastle* case (165 Fed. 273) decided that the town had such an interest in the highway that it could oppose the condemnation, and that such interest was entitled to at least nominal damages.

(b) When a state condemns the public rights represented by subordinate agencies of the state, such as cities, etc., the right to compensation has been recognized.

“If it were a private corporation which owned this water works, there would be no question as to the liability of the state to make compensation for the appropriation of the property. We can see no reason for withholding compensation

simply because the owner is a municipal corporation.”

City of Little Falls v. State of New York,
190 N.Y.S. 807 (1921).

(c) When the rights of a privately owned public utility corporation have been condemned, either by a state agency or by the United States, the right to compensation has been recognized.

United States v. Boston Elevated R. R. Co.,
176 Fed. 963 (1910);

New York Telephone Company v. State, 154
N.Y.S. 1059 (1915);

Petition of Gillespie, 32 N.Y.S.(2d) 96
(1942).

In the *Boston Elevated* case the Government was lessee of property abutting on a street, which it used for a post office site and the Government claimed an interest in the sidewalk area in front of the property. As such lessee it opposed the construction of a subway in the street by a franchise holder. It was held that the Government could not prevent the subway construction; that it could acquire rights in the highway as against the franchise holder only upon payment of compensation.

IV. When the United States condemns property for its purpose it occupies the position of a “stranger.”

Town of Nahant v. United States, 136 Fed.
273 (1905) af. 153 Fed. 520.

*United States v. Certain Land in the Town
of Newcastle*, 165 Fed. 783 (1908);

Town of Bedford v. United States, 23 F. (2d) 453 (1927), 56 A.L.R. 360.

V. Although a franchise is subject to the police power, that power must be exercised reasonably and only in aid of public travel on the highway.

New York and Queens Electric Light & Power Co. v. City of New York, 224 N.Y. S. 564 (1927);

Milwaukee Electric Ry. & Light Co. v. City of Milwaukee, 209 Wis. 656 (1932), 245 N.W. 856.

In the *Milwaukee* case the court said:

“Unless the removal and relocation of the lines be made necessary for the usual use of the streets by the public, and compellable in a proper and reasonable exercise of the police power by the city in the exercise of governmental authority, the owner thereof cannot be compelled to remove or relocate the same without just compensation.”

The police power cannot be used to aid another privately owned public utility.

Transit Commission v. Long Island R. Co., 253 N.Y. 345 (1930), 171 N.E. 565.

Nor to aid the city's own proprietary activities.

East Rochester v. Rochester Gas & Electric Corp., 31 N.Y.S.(2d) 754 (1941);

New York v. New York Telephone Co., 278 N.Y. 9 (1938), 14 N.E.(2d) 831;

City of Los Angeles v. Los Angeles Gas & Elec. Corp., 251 U.S. 32 (1919).

VI. Property is "taken" when its usefulness is destroyed or impaired.

City of Belleville v. St. Clair County Turnpike Co., 234 Ill. 428 (1908), 84 N.E. 1049;

Peabody v. United States, 231 U.S. 530 (1913);

Morrison v. Clackamas County, 141 Ore. 564 (1933), 18 P.(2d) 814;

United States v. Welch, 217 U.S. 333 (1910);
29 C.J. §917.

VII. What is "property" is to be determined according to the local law.

Henry Ford & Son, Inc. v. Little Falls Fibre Company, 280 U.S. 369 (1930);

United States ex rel. Tennessee Valley Authority v. Powelson, 319 U.S. 266 (1943).

Counsel cite as contrary authority *United States v. Miller*, 317 U.S. 369 (1943) (Br. 12). But this case is not entitled to consideration here for two reasons: first, the two authorities upon which it relies do not support it; second, the essential point decided in the *Miller* case was simply that the Government actually "took" the land at the time that Congress definitely showed its determination to complete the project. So that whatever happened to the land after that date (at least anything which benefited the landowner) did not increase the value of the property in his hands. *What* is taken and *when* it is taken are two different questions.

Moreover, the rule is subject to the following qualifications stated in a recent case:

“Though the meaning of ‘property’ as used in * * * the Fifth Amendment is a federal question, it will normally obtain its content by reference to local law.”

United States ex rel. Tennessee Valley Authority v. Powelson, 319 U.S. 266 (1943).

VIII. A public utility is entitled to “severance” damages—such damages are within the Fifth Amendment.

The general rule that a public utility is entitled to severance damages is well established.

Puget Sound Power & Light Company v. Puyallup, 51 F.(2d) 688 (1931);

Puget Sound Power & Light Company v. Public Utility District No. 1 of Whatcom County, 123 F.(2d) 286, 290 (1941).

Damages to the remainder not taken, commonly called “severance” damages, is a part of the just compensation which must be paid by the Federal Government under the Fifth Amendment.

United States v. Welch, 217 U.S. 333 (1910);

Campbell v. United States, 266 U.S. 368 (1924);

United States v. Miller, 317 U.S. 369, 376 (1943).

The taking of Bile Street constitutes a severance damage to the company. Its electric line in Bile Street was connected with its generating plants and by reason of such connection, if for no other reason, was an interest in land. This line must be rebuilt to continue

service to a customer who was entitled to the service. The service required the use of the whole system, from generating plant to customer. Any necessary segment of the system which is removed damages the whole system to the amount required to replace the part removed.

SUMMARY

The Government stands on a technical application of the conception of an "interest in land." The Fifth Amendment is not so restricted. Even so, a franchise holder, when he occupies the public highway with his equipment acquires an "interest in land." At all events, it is "private property" which is entitled to compensation under the Fifth Amendment. It is clear that the loss of this property results in a "severance" damage to the remainder of the company's electric system and should be paid for as such.

Having determined that the rights thus acquired are protected by the constitution, the rule applicable to consequential damages becomes immaterial. The cases involving removal of equipment used in a business will all be found to involve personal property which had not acquired the status of fixtures either to the land taken or to any other land. The "frustration of contracts" cases relied on by the Government all involved the performance of contracts which did not require the use of any specific land.

The condemnation in the instant case was occasioned by the need of the Government to provide housing facilities for workers engaged in war produc-

tion,—a plausible Federal object. But the words of Justice Holmes are pertinent:

“We are in danger of forgetting that a strong public desire to improve the public condition is not enough to warrant achieving the desire by a shorter cut than the constitutional way of paying for the change.”

Pennsylvania Coal Company v. Mahon
260 U. S. 393, 416 (1922).

The judgment of the lower court was correct and should be affirmed.

Respectfully submitted,

HOLMAN, SPRAGUE & ALLEN

EMORY E. HESS

Attorneys for Appellee.

No. 10654

**In the United States Circuit Court of Appeals
for the Ninth Circuit**

UNITED STATES OF AMERICA, APPELLANT

v.

PUGET SOUND POWER AND LIGHT COMPANY, A CORPORATION,
APPELLEE

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES
FOR THE WESTERN DISTRICT OF WASHINGTON, NORTHERN
DIVISION

REPLY BRIEF FOR THE UNITED STATES

NORMAN M. LITTELL,
Assistant Attorney General.

FRANK P. KEENAN,
*Special Assistant to the Attorney General,
Seattle, Washington.*

VERNON L. WILKINSON,
LAWRENCE VOLD,
*Attorneys, Department of Justice,
Washington, D. C.*

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REPLY BRIEF FOR THE UNITED STATES

ARGUMENT

In this reply brief the Government will discuss each of appellee's eight contentions seriatim.

APPELLEE'S POINT I

We agree that public utility franchises are private property. Business, goodwill, and contracts are likewise private property. We also agree that when such property is actually "taken" the owner is protected by the Fifth Amendment. See *Louisville v. Cumberland Tel. & Tel. Co.*, 224 U. S. 649 (1912); *Owensboro v. Cumberland Tel. & Tel. Co.*, 230 U. S. 58 (1913);

Los Angeles v. Los Angeles Gas & Electric Corporation, 251 U. S. 32 (1919); *Monongahela Navigation Co. v. United States*, 148 U. S. 312 (1893), cited by appellee (Br. 3-4). But, as pointed out in the Government's opening brief, pages 13-14, 16-18, when the Government condemns "land," and not the "business" thereon, it is not liable for the attendant loss of business opportunities nor for the frustration of private contracts. One must have an actual interest in the land taken to share in the compensation. *Chicago, M., St. P. & P. R. Co. v. Chicago, R. I. & P. Ry. Co.*, 138 F. 2d 268 (C. C. A. 8, 1943), certiorari denied January 10, 1944. Therefore, unless the franchise from King County conferred on the appellee a property right in Bile Street no compensation is due the appellee under the Fifth Amendment for consequential losses.

APPELLEE'S POINT II

Appellee ignores the distinction between an easement and a license (Br. 4-9). Manifestly, it would be an extreme overstatement to assert that whenever a license to enter upon and use land is acted upon and equipment placed on the land pursuant thereto an "interest in land" is acquired. The user of a ticket to a race-track spectacle (*Marrone v. Washington Jockey Club*, 227 U. S. 623 (1913)), or a theatre performance (*Hurst v. Picture Theatres, Ltd.* (1915), 1 K. B. 1), acquires no "interest in land" as that term is commonly understood, though entitled to remain upon the land for the time being as contemplated by the arrangement. It has been well said that

“both theatre proprietor and theatre patron would be surprised to learn that the purchase of a ticket ‘to see a show’ was a sale of land.” Clark, *Covenants and Interests running with the Land* (1929), p. 42. A concessionaire holding a valuable exclusive privilege for the sale of refreshments and of advertising space in a theatre building acquires no interest in the building for which he can recover compensation from a party entitled to condemn who takes over the building. It was said in such a case that a license to carry on the concessionaire’s trade on the land did not confer an interest in the land. *Warr v. London County Council* (1904), 1 K. B. 713. Likewise a contract right to use another company’s railroad right-of-way is not an interest in land entitling such user to share in a condemnation award. *Chicago, M., St. P. & P. R. Co. v. Chicago, R. I. & P. Ry. Co.*, 138 F. 2d 268 (C. C. A. 8, 1943), certiorari denied January 10, 1944.

The Washington Supreme Court has repeatedly held that the electric street railway’s franchise to operate its service in the city streets is not an interest in land against which, under local statutes, assessments for benefits incident to street improvements can be made. *City of Seattle v. Seattle Elec. Co.*, 48 Wash. 599, 94 Pac. 194 (1908); *In re City of Seattle*, 49 Wash. 109, 94 Pac. 1075, 1079 (1908); *In re City of Seattle*, 54 Wash. 460, 103 Pac. 807, 808 (1909). In *Washington Water Power Co. v. Rooney*, 3 Wash. 2d 642, 101 P. 2d 580, 583 (1940), the court stated that “a franchise is a grant of a right to conduct a specific business in the streets.” The privilege to occupy land under a

license is not such an interest in the land itself that a licensee can recover compensation for it from a condemner of the land. *Clapp v. City of Boston*, 133 Mass. 367 (1882). See also *Sabine & E. T. Ry. Co. v. Johnson*, 65 Tex. 389 (1886) (license to graze cattle on another's land does not confer any interest in the land); *Taylor v. Gerrish*, 59 N. H. 569 (1880), (license to install connection with spring on another's land conferred no interest in the land). A contract for a license to use real estate which does not amount to an easement may be oral and does not have to satisfy the Statute of Frauds as to contracts for interests in land. Williston on Contracts, sec. 493, with numerous authorities cited, including cases holding that contracts to erect buildings or other structures upon land are not within the Statute of Frauds, although the structures when completed will be real estate.

Mere verbal definition of the terms "easement" and "license" shows considerable overlapping in the content of these two terms, as witness Tiffany on Real Property, sec. 756, defining an easement, and sec. 829, defining a license. In both cases is involved the privilege of doing a certain class of act on another's land. The holder of an easement, however, is usually regarded as having an interest in the so-called "servient tenement" which ordinarily is not revocable and which is enforceable against the owner of the "servient tenement" as well as against strangers who interfere therewith. The holder of a license, on the other hand, is ordinarily not regarded as holding any interest in the land upon which the license

is to be exercised. Ordinarily, the license is revocable in the absence of further modifying circumstances sometimes characterized as involving elements of contract or of estoppel. Even though a license may through such means become technically irrevocable, it still does not confer "an interest in land" as the term is ordinarily understood and applied. For more extended analytical discussion of the concepts involved in licenses in real property, see Clark, *Covenants and Interests running with the Land* (1929), pp. 8-51.

At pages 7-8 of the opening brief of the United States certain authorities from the state of Washington and from other jurisdictions were cited in which such franchises as are involved in the present case were characterized as licenses or permits. In footnote 4 at page 10 of the Government's brief are cited the leading Washington authorities showing that a franchise to maintain an electric transmission line in a public highway involves no added burden to the highway easement for which the abutting property owners are entitled to compensation. The Washington statute which authorizes the granting of such franchises as are involved in the present case does not purport to authorize a conveyance of any interest in the soil of the highway but states that the County Commissioners "may grant authority for the construction, maintenance, and operation of transmission lines for transmitting electric power, together with poles, wires, and other appurtenances, upon, over, along, or across any such public streets or road, and

in granting such authority * * * may prescribe the terms and conditions on which such transmission line and its appurtenances shall be maintained and operated." Remington, Revised Statutes of Washington, sec. 5430. Washington cases annotated under this section have treated the franchise granted under the authority of this statute as contractual in nature. *Castle Rock v. Furth*, 78 Wash. 47, 138 Pac. 317 (1914); *Tacoma Ry. & Power Co. v. City of Tacoma*, 79 Wash. 508, 140 Pac. 565 (1914). That the Washington Constitution forbids the granting of an irrevocable or exclusive franchise to a private utility, see Art. I, secs. 8, 12; Art. XII, sec. 1. In the state of Massachusetts, which, like the state of Washington, regards such franchises as involving no added burden to the highway easement (*New England Tel. & Tel. Co. of Mass. v. Boston Terminal*, 182 Mass. 397, 65 N. E. 835 (1913)), it has been stated outright that such a franchise granted by a private landowner to the telephone company is a mere license and the franchise holder a licensee. *Nelson v. American Tel. & Tel. Co.*, 270 Mass. 471, 171 N. E. 416 (1930).

Moreover, the Washington statutes providing for the taxation of personal property have been held to include franchises. See *Commercial Elec. Light & Power Co. v. Judson*, 21 Wash. 49, 56 Pac. 829, 831 (1899). Indeed, in this connection, the statutory language itself classifies franchises as personal property. See Remington, Rev. Stats. of Wash., sect. 11,199 ("* * * franchises, royalties, and other personal property"). See also secs. 11,157 and 11,161. Under

section 520, too, it is provided that all franchises of every kind and nature heretofore or hereafter granted shall be subject to sale upon execution and upon order of sale issued upon foreclosure of mortgage, "in the same manner as any other personal property * * *."

Certain other jurisdictions have treated such a franchise as an additional burden on the highway easement and have required the public utility to compensate the abutting owner for the additional burden. In such states the utility thereby acquires an interest in the highway. See, notably, *New York Telephone Co. v. State*, 154 N. Y. Supp. 1059 (1915), where this position not only is examined at length but is distinguished from, and contrasted with, the line of authority which in this respect is followed in the state of Washington. To the same effect in this regard see *Thompson v. Orange & Rockland Elec. Co.*, 254 N. Y. 366, 173 N. E. 224 (1930); *Gurnsey v. Northern California Power Co.*, 160 Calif. 699, 117 Pac. 906 (1911); *Chesapeake & Potomac Telephone Co. v. Tyson*, 160 Md. 298, 153 Atl. 271 (1931). Under this line of authority it has sometimes been said that such franchises when exercised become easements. See *Consolidated Gas Co. v. Mayor, etc., of the City of Balto.*, 101 Md. 541, 61 Atl. 532, 534 (1905) (appellee's br., p. 5); *Stockton Gas & Elec. Co. v. San Joaquin Co.*, 148 Calif. 313, 83 Pac. 54, 56 (1905) (appellee's brief, p. 5).

It is therefore not correct to state (appellee's brief, p. 6) that franchise rights constitute an interest in

land in the state of Washington. The two cases cited by appellee for that position are from California and Maryland, jurisdictions which hold, contrary to the Washington decisions, that such franchises constitute added burdens on the highway easement. The Washington cases cited in appellee's brief, pp. 6 and 7, manifestly do not support the asserted position that franchise rights constitute an interest in land. One may look in vain in the opinion in *Commercial Elec. Light & Power Co. v. Judson*, 21 Wash. 49, 55, 56 Pac. 829 (1899), for any statement that such a franchise is an interest in land. The opinion treats such a franchise as personalty, following in this respect the language of the state statutes. The case of *Great Northern Ry. Co. v. Seattle*, 180 Wash. 368, 39 P. 999 (1935), is not a decision that such a franchise is an interest in land but that the franchise is a property right which may not be "taken or damaged" without the payment of compensation, a position required by the "or damaged" provision of the Washington Constitution (Art. I, sec. 18), as explained in the Government's opening brief, p. 15. The dictum quoted (appellee's brief, p. 7) from *Dunsmuir v. Port Angeles Gas, Water, Electric Light & Power Co.* does not touch in any manner the character of the franchise whether as an interest in land or as personalty. It merely suggests the propriety under certain circumstances of treating the physical equipment, the pipes and mains laid in the city streets, as appurtenances to the realty of the utility company's central plant rather than as part of the realty of streets of the city through which they were laid.

At page 9 of appellee's brief, in order to avoid the application of cases cited in the Government's opening brief, it is asserted that the franchise involved in the present case is not revocable. Appellee has apparently overlooked that part of the Washington Constitution cited in the Government's brief at page 8, footnote 3, prohibiting the granting of an irrevocable franchise. On the question of whether the defendant's franchise was an easement or a license, does it matter that the grantor of the defendant's revocable privilege was not also the condemner? Is the franchise in the present case a license or an easement, as the case may be, contingent upon the purely fortuitous circumstances of whether it is the state of Washington or the United States that in the instance exercises the power to condemn? In *Warr v. London County Council* (1904), 1 K. B. 713, already discussed above, the condemner was a "stranger" to the concession in the theatre which was held not to be an "interest in land."

APPELLEE'S POINTS III AND IV

Appellee's contention (Br. 9-11) that upon condemnation of public highways compensation may be recovered is misleading. We agree that compensation may be recovered but only by those who have an actual interest in the highway (the public authorities, abutting landowners, etc.). The cases cited in appellee's subdivisions (a) and (b) are, without exception, cases where the claimant actually was the holder of the public highway easement (the county, town, or state as the case might be), and not, as in

the present case, a utility company whose only property interest in that regard is a license to share in the use of the county's public highway easement. In the present case the United States joined as a defendant King County, the holder of the public highway easement condemned in this proceeding (R. 2, 19). Its claim is not in issue on this appeal. The three decisions cited in appellee's subdivision (c) (p. 11) do not support appellee's claim in the present case. *New York Telephone Co. v. State*, 154 N. Y. S. 1059 (1915), is a case decided under the law of the State of New York where the utility company's transmission line in the highway is held to involve an additional easement or servitude beyond that involved in the public highway easement, a position which has been decisively rejected in the State of Washington (Govt. Op. Br., pt. 10, footnote 4). *Petition of Gillespie*, 32 N. Y. S. 2d 96 (1942), is another New York case, which also involves the additional feature that a special statute there required compensation to be paid by the city not only for property taken but also for loss incurred. No such statute is applicable to the United States in the present case. The case of *United States v. Boston Elevated Ry. Co.*, 176 Fed. 963 (1910), holds that the United States could not enjoin the construction of the company's subway in the street area of the city of Cambridge, undertaken under authority from the city, where the United States had not condemned the street area in question but was merely in occupation under a license which had been revoked. The case

does not decide that if the United States did condemn in such a case it must make compensation not only to the holder of the public highway easement but also to a party having merely a license to share in the use of that public highway easement.

Similarly, the cases cited by appellee under Point IV (Br. 11-12) are cases where the claim was interposed by the holder of the public highway easement (the city authorities), being in that respect comparable to King County in the present case. In none of these cases was a claim sustained in favor of the holder of a mere license to share in the use of the county's or town's public highway easement.

APPELLEE'S POINT V

The cases cited on this point (Br. 12) do not bear out appellee's claim in the present case. The expressions relied upon by appellee in these cases in substance all adopt the position taken by the Supreme Court of the United States in case of *City of Los Angeles v. Los Angeles Gas & Elec. Corp.*, 251 U. S. 32 (1919). In that case an irrevocable franchise constituted a valid contract, the obligation of which could not constitutionally be impaired by the state or its political subdivisions, the acts challenged being found not to be within the reasonable exercise of police power. Obviously, such decisions have no application to frustration of contractual obligations by the United States through condemnation proceedings. See Govt. Op. Br., pp. 14, 16-18.

APPELLEE'S POINT VI

As indicated in the Government's opening brief (pp. 14-19), "frustration and appropriation are essentially different things." The proposition stated in appellee's point VI (Br. 13) is substantially accurate only under constitutional or statutory provisions requiring compensation for property "taken or damaged" (Govt. Op. Br., p. 15). The case *City of Belleville v. St. Clair County Turnpike Co.*, 234 Ill. 428, 84 N. E. 1049 (1908), arose under such a constitutional provision. In the case of *Peabody v. United States*, 231 U. S. 530 (1913), the court held there was no "taking." That case by dictum reaffirmed *United States v. Welch*, 217 U. S. 333 (1910), which was a case of flooding the physical property, not a case of frustration of the contract rights of a licensee to share in the use of a public highway easement. The case of *Morrison v. Clackamas County*, 141 Ore. 564, 18 P. 2d 814 (1933), too, was a case of flooding of the physical property. If there is any conflict between any of the pronouncements contained in the opinion in that case and the holding of the Supreme Court of the United States in the contract frustration cases cited in the Government's original brief (pp. 14-19) it is submitted that the authority of the Supreme Court of the United States rather than that of the Supreme Court of Oregon is controlling in the present proceeding.

APPELLEE'S POINT VII

The Government finds no occasion in the present case to explore the question of to what extent and

under what circumstances the meaning of the term "property" is to be found by reference to other criteria than local law. As said in the case of *United States v. Powelson*, 319 U. S. 266 (1943), "it will normally obtain its content by reference to local law." The Washington law in the instant case makes it clear that appellee's franchise is not a property right in Bile Street (Govt. Op. Br., pp. 7-10, 15, *supra*, pp. 2-9).

APPELLEE'S POINT VIII

The application to the present case of the decisions cited on severance damages depends upon the question of whether appellee had property interests in Bile Street which were taken by the United States. None such being found, the doctrine of severance damages, as shown in the Government's opening brief (pp. 18-19), is not applicable. The only new suggestion made in this respect is appellee's assertion (Br. 14) that "Its electric line in Bile Street was connected with its generating plants and by reason of such connection, if for no other reason, was an interest in land." It is sufficient answer to say that if that suggestion is to be indulged, the "land" of which this electric line was a part was not Bile Street but the realty on which the central plant was located, which was not taken by the United States in these proceedings. In this connection the following quotation seems pertinent: "We do not understand that the learned counsel for the respondent claims that they [water pipes and mains] really became fixtures by reason of their having been laid underground or through the

streets of the city; for, if it be true that they thereby became fixtures, the ownership thereof was thus transferred to the proprietor of the land to which they were affixed, which the respondent does not concede." *Dunsmuir v. Port Angeles Gas, Water, Light and Power Co.*, 24 Wash. 104, 63 Pac. 1095, 1098 (1901).

CONCLUSION

For the foregoing reasons it is respectfully submitted that the district court erred in awarding the appellee \$408.98, together with interest, for the expenses which it incurred in rebuilding a transmission line which it formerly operated on Bile Street under a franchise from King County. Any allowance for such expenditures should be stricken from the judgment, and the judgment as so modified should be affirmed.

NORMAN M. LITTELL,
Assistant Attorney General.

FRANK P. KEENAN,
Special Assistant to the Attorney General,
Seattle, Washington.

VERNON L. WILKINSON,
LAWRENCE VOLD,
Attorneys, Department of Justice,
Washington, D. C.

APRIL 1944.

No. 10662

United States
Circuit Court of Appeals
For the Ninth Circuit.

WELLS FARGO BANK & UNION TRUST CO.,
Executor of the Estate of Ben F. Sternheim,
deceased,

Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

Transcript of the Record

Upon Petition to Review a Decision of the Tax Court
of the United States

FILED

FEB - 8 1944

PAUL P. O'BRIEN,
CLERK

No. 10662

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Circuit Court of Appeals
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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur.]

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APPEARANCES:

For Taxpayer:

F. M. McAULIFFE, ESQ.,

L. C. BAKER, ESQ.,

For Comm'r:

HARRY R. HARROW, ESQ.,

DOCKET No. 111776

ESTATE OF BEN F. STERNHEIM, deceased,
WELLS FARGO BANK & UNION TRUST
CO., Executor,

Petitioner,

v.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

DOCKET ENTRIES

1942

July 7—Petition received and filed. Taxpayer notified. Fee paid.

July 8—Copy of petition served on General Counsel.

July 7—Request for Circuit hearing in San Francisco, California filed by taxpayer. 7-8-42
Granted.

Aug. 5—Answer filed by General Counsel.

Aug. 7—Copy of answer served on taxpayer, San Francisco, California.

1943

- Jan. 5—Hearing set Feb. 1, 1943 in San Francisco, California.
- Feb. 2—Hearing had before Judge Smith on the merits. Submitted. Petitioners brief due 3-21-43. Respondents 4-25-43. Reply 5-20-43.
- Feb. 24—Transcript of hearing 2-2-43 filed.
- Mar. 15—Brief filed by taxpayer. 3-15-43 Copy served on General Counsel.
- Apr. 21—Reply brief filed by General Counsel. Served 4-22-43.
- May 11—Reply brief filed by taxpayer. 5-11-43 Copy served on General Counsel.
- June 24—Memorandum findings of fact and opinion rendered, Smith, Judge. Decision will be entered under Rule 50. 6-25-43 Copy served.
- Aug. 14—Computation filed by General Counsel.
- Aug. 18—Hearing set Sept. 15, 1943 on settlement.
- Sept. 2—Consent to settlement filed by taxpayer.
- Sept. 3—Decision entered, Murdock, Judge. Div. 3.
- Nov. 9—Petition for review by U. S. Circuit Court of Appeals, 9th Circuit, with assignments of error filed by taxpayer.
- Nov. 9—Proof of service filed by taxpayer.
- Dec. 11—Certified copy of an order from 9th Circuit extending time to 1-19-44 to prepare and complete record filed.
- Dec. 14—Statement of points filed by taxpayer with proof of service thereon.

1943

Dec. 14—Designation for record on review filed by taxpayer with proof of service thereon and agreed to. [1*]

United States Board of Tax Appeals

Docket No. 111776

ESTATE OF BEN F. STERNHEIM, deceased,
WELLS FARGO BANK & UNION TRUST
CO., Executor,

Petitioner,

v.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

PETITION

Estate of Ben F. Sternheim, deceased, Wells Fargo Bank & Union Trust Co., Executor, petitioner above named, hereby petitions for a redetermination of the deficiency set forth by the Commissioner of Internal Revenue in his Notice of Deficiency dated April 29, 1942, bearing the symbols San Francisco, IRA:ET:90-D CSW, and also MT-ET-10384—First California, and as a basis for its petition alleges the following:

1. Wells Fargo Bank & Union Trust Co. is a corporation organized and existing under and by

*Page numbering appearing at top of page of original certified Transcript of Record.

virtue of the laws of the State of California, with its principal place of business in the City and County of San Francisco, said State, and its address is No. 4 Montgomery Street, San Francisco, California. Said Wells Fargo Bank & Union Trust Co. is the duly appointed, qualified and acting executor of the last Will and Testament of said Ben F. Sternheim, deceased, [2] having been appointed by decree of the Superior Court of the State of California, in and for the City and County of San Francisco, dated May 2, 1940, in proceedings pending in said Superior Court entitled "In the Matter of the Estate of Ben F. Sternheim, also known as Benjamin F. Sternheim, also known as B. F. Sternheim, deceased", and numbered 83929 in the files and records of said court.

The return in question was filed with the Commissioner of Internal Revenue for the First District of California.

2. The Notice of Deficiency, with the statement which accompanied the same, was mailed to petitioner on April 29, 1942, and a copy of said Notice and statement is attached hereto and marked Exhibit "A".

3. The taxes in controversy are Federal Estate taxes. The amount in controversy is \$54,167.93.

4. The determination of tax set forth in said Notice of Deficiency is based on the following errors:

(a) The Commissioner of Internal Revenue erred in determining that the deductions claimed under Items 1 to 7 inclusive of Charitable, Public

and Similar Gifts and Bequests, Schedule N of petitioner's return, representing the value of remainder interests passed to charitable, public or educational organizations, under the terms of a revocable trust created by the decedent, Ben F. Sternheim, on June 9, 1938, and under the terms of the testamentary trust created by the last will and testament of said decedent, were not proper deductions.

(b) The Commissioner of Internal Revenue erred in determining that by reason of the power given to the trustee in said revocable trust and said last Will and Testament in the [3] uncontrolled discretion of the trustee to use and apply such part of the principal of each trust estate as the trustee may consider suitable or necessary in the interest and welfare of the individual life beneficiaries in the event of sickness, accident, want or other emergency of or to any of said individual life beneficiaries then receiving the income from the trust estate or from any portion thereof, provided that not more than ten per cent (10%) of the portion of the principal of the trust estate held for any such individual life beneficiary shall be used or applied in any one year for such purposes or any of them, conferred upon the trustee the power to divert the whole of the bequests, devises and gifts to uses and purposes which would have rendered them not deductible had they been directly so bequeathed, devised or given by the decedent.

(c) The Commissioner of Internal Revenue

erred in determining that because of the power conferred upon the trustee hereinbefore mentioned, the beneficial interests of the charitable, public or educational organizations are not severable from the interests in favor of the private uses and are not presently ascertainable.

(d) The Commissioner of Internal Revenue erred in determining that the power conferred upon the trustee, hereinbefore mentioned, operates to deprive the estate of the decedent of the right to deduct the value of the remainder interests to charitable, public and educational organizations named in each of the trusts in determining the amount of estate tax payable on account of the death of said decedent. [4]

(e) The Commissioner of Internal Revenue erred in not allowing a deduction for alleged income tax deficiencies and interest accrued thereon heretofore determined by said Commissioner of Internal Revenue as owing at the date of the death of the decedent;

(f) The Commissioner of Internal Revenue erred in not allowing a deduction for Federal Estate tax deficiencies and interest accrued thereon upon the estate of Rosie Sternheim, deceased, mother of said decedent Ben F. Sternheim, heretofore determined as owing by said Ben F. Sternheim, deceased, as transferee, at the date of his death;

(g) The Commissioner of Internal Revenue erred in not allowing a deduction for additional fees charged against said estate of said decedent,

Ben F. Sternheim, by the executors and attorneys of said estate;

(h) The Commissioner of Internal Revenue erred in not increasing the deduction taken in schedule (g) of the Estate Tax return heretofore filed on behalf of said estate for the charitable remainder created by the transfer during the lifetime of Ben F. Sternheim, deceased, in the amount of the proper proportion of the sum of \$392.08 representing dividends on four life insurance policies payable to the trustee of the revocable trust created by said decedent on June 9, 1938, as set forth in subdivision (b) of the statement attached to said Notice of Deficiency;

(i) The Commissioner of Internal Revenue erred in failing to allow a credit for inheritance taxes paid to the State of California, as provided by Section 813(b) of the Internal Revenue Code.

[5]

5. The facts upon which the petitioner relies as the basis for this proceeding are the following:

(a) The net income from the trust estates under said revocable trust and said last Will and Testament will be sufficient to provide for all probable needs of the life beneficiaries without the necessity of resorting to principal under the power conferred upon the trustee as hereinbefore mentioned;

(b) The provisions of said revocable trust and said last Will and Testament do not authorize resort to principal upon the request, direction or desire of any life beneficiary, nor is it mandatory upon the trustee under either of said trusts that

any payment of principal be made to any beneficiary. On the contrary, resort may be had to principal only in the exercise of uncontrolled discretion by the trustee, and the purpose for which said withdrawals may then be made is limited to the case of sickness, accident, want or other emergency.

(c) The amount of principal which may be used for the designated purposes is limited in any one year to ten per cent of the value of the trust estate. Said value is determined as of the date of each exercise of the conferred power and not as of the date of the creation of the trust. As a matter of general practice the power to resort to principal for the designated purposes is rarely and sparingly exercised by the trustee. As a result the charities named in said revocable trust and said last Will and Testament will necessarily realize the benefits [6] conferred upon them by said remainders and said benefits may be definitely ascertained.

(d) The Commissioner of Internal Revenue has heretofore alleged and claimed against the estate of said decedent liability for alleged income tax deficiencies in the total principal sum of \$315,390.23. It has been proposed that said claim be compromised with the result that upon approval of said compromise the estate of said decedent, Ben F. Sternheim, will be liable to pay the sum of \$109,975.02 with interest accruing from May 15, 1942, in full settlement of principal and interest on said claim for alleged deficiencies in income taxes. Of this sum it is proposed that Blanche Sternheim will

pay 15,176.57 or a total of 94,798.45, plus accruing interest payable by the estate of said decedent in the event said compromise shall be finally approved. The interest which has accrued on the principal amount of said compromise since the date of the death of said decedent is \$10,608.00, leaving the sum of \$84,190.45 payable as of the date of the death of said decedent in the event said proposed compromise should be finally consummated.

(e) The Commissioner of Internal Revenue has heretofore alleged and claimed against the estate of said decedent, Ben F. Sternheim, liability as transferee for alleged Federal Estate tax deficiencies upon the estate of Rosie Sternheim, deceased, mother of said decedent, Ben F. Sternheim, in the sum of \$11,626.27, plus interest, and \$2,906.57 penalty. The amount actually due for said Federal Estate taxes upon the estate of said Rosie Sternheim, deceased, does not in any event exceed \$6,079.02, plus accruing interest, and penalty in the sum of \$1519.76. The interest on said Federal Estate taxes due upon the estate of said Rosie Sternheim, deceased, to the date of the death of said Ben F. Sternheim, [7] deceased, is the sum of \$5,806.73.

(f) There has become chargeable to the estate of Ben F. Sternheim, deceased, the sum of \$5000. as and for an extraordinary fee of the executor of said estate and the additional sum of \$5000. as and for an extraordinary fee of the attorneys for the executor of said estate;

(g) As set forth in subdivision (b) of the statement attached to said Notice of Deficiency a total sum of \$392.08 was paid as dividends on four life insurance policies payable to the trustee of the revocable trust created by decedent, Ben F. Sternheim, on June 91, 1938. Said dividends increased the value of the charitable remainder of said life insurance trust by the sum of \$145.06;

(h) Petitioner has heretofore filed evidence of inheritance tax paid to the State of California as required by Article 81.9 of Treasury Regulations 105.

(i) The provisions of said revocable trust and said last Will and Testament with respect to the payment of principal are as follows:

“My trustee shall have the power in its uncontrolled discretion to use and apply such part of the principal of the trust estate held for any beneficiary as it may consider suitable or necessary in the interest and for the welfare of such beneficiary in the event of sickness, accident, want or other emergency of or to any of the beneficiaries then receiving the income from the trust estate or from any portion thereof; provided that, except as otherwise herein provided, not more than ten per cent (10%) of the portion of the principal of the trust held for any beneficiary shall be used or applied in any one year for said purposes or any of them.”

Wherefore, petitioner prays that this Board may hear [8] this proceeding and determine that there

is no deficiency in Federal Estate taxes on account of the death of the decedent above named; that the estate of said decedent is entitled to a refund in the sum of \$5,343.45 on account of excess Federal Estate taxes heretofore paid (or more in the event said proposed settlement of alleged income tax deficiency should not be approved and said tax deficiency should ultimately be finally determined to be greater than the amount of said proposed settlement), and for such other relief as to this Board may seem proper.

F. M. McAULIFFE

L. C. BAKER

Attorneys for Petitioner

14 Montgomery Street

San Francisco, California [9]

SN-ET-1

EXHIBIT "A"

Form 1236

(Vignette)

Office of
Internal Revenue Agent in Charge
San Francisco Division
IRA:ET:90-D
CSW

Treasury Department
Internal Revenue Service
74 New Montgomery Street
San Francisco, California

Apr 29 1942

Estate of Ben F. Sternheim, Deceased,
Wells Fargo Bank & Union Trust Co., Executor,
4 Montgomery Street
San Francisco, California

Re: MT-ET-10384-First California
Estate of Ben F. Sternheim
Date of death—April 9, 1940

Gentlemen:

You are advised that the determination of the estate-tax liability of the above-named estate, discloses a deficiency of \$48,824.39, as shown in the statement attached.

In accordance with the provisions of existing internal-revenue laws, notice is hereby given of the deficiency mentioned.

Within 90 days (not counting Sunday or a legal holiday in the District of Columbia as the 90th

day) from the date of the mailing of this letter, you may file a petition with the United States Board of Tax Appeals for a redetermination of the deficiency.

Should you not desire to file a petition, you are requested to execute the enclosed form and forward it to the Internal Revenue Agent in Charge, San Francisco, for the attention of Conference Statement. The signing and filing of this form will expedite the closing of your return by permitting an early assessment of the deficiency and will prevent the accumulation of interest, since the interest period terminates 30 days after filing the form, or on the date assessment is made, whichever is earlier.

Respectfully,

GUY T. HELVERING,

Commissioner,

(Signed) By F. M. HARLESS

Internal Revenue Agent in
Charge.

Enclosures:

Statement.

Form or waiver. [10]

ESTATE TAX

San Francisco

IRA:ET:90-D

CSW

MT-ET-10384-First California

Estate of Ben F. Sternheim

Date of Death—April 9, 1940

STATEMENT

	Liability	Assessed	Deficiency
Estate Tax	\$56,075.21	\$7,250.82	\$48,824.39

In making this determination of the Federal estate tax liability of the above-named estate, careful consideration has been given to the protest dated February 2, 1942, and to statements made at the conference held on February 27, 1942.

In your protest and at the conference above-mentioned, a deduction was referred to and claimed on account of the assertion of the Federal Government against the decedent and his estate of income tax liabilities in the aggregate principal amount of \$315,154.67. The records disclose, however, that determination of the amount of said income tax liabilities is now pending on a petition to the United States Board of Tax Appeals. It is held, therefore, that no deduction is allowable herein on this account until the amount of the obligation is finally determined. (See Article 81.29 of Treasury Regulations 105.)

A copy of this letter and statement has been mailed to your representatives, F. M. McAuliffe and L. C. Baker, 14 Montgomery Street, San Francisco, California, in accordance with the authority contained in the power of attorney executed by you and on file in this office.

Pursuant to the election made by the executor in the return, the estate is valued under the optional valuation provisions of section 811(j) of the Internal Revenue Code and Article 81.11 of Treasury Regulations 105. [11]

Estate of Ben F. Sternheim

Statement

ADJUSTMENT TO NET ESTATE

Net estate for basic tax as disclosed by return.....\$ 24,627.43

Additions to value of net estate and decreases in deductions:

(a) Stocks and Bonds, Schedule B of return	\$ 881.96	
(b) Transfers During Decedent's Life, Schedule G of return	392.08	
(c) Charitable, etc., Bequests, Schedule N of return	283,974.60	285,248.64
Total		\$309,876.07

Reductions in value of net estate and increases in deductions:

(d) Funeral and Administration Expenses, Schedule J of return.....	\$ 22,500.00	
Executor's Commissions	\$ 7,500.00	
Attorney's Fees	15,000.00	
Reductions in value of net estate....	0.00	22,500.00

Net estate for basic tax as adjusted.....\$287,376.07

Net estate for additional tax as adjusted\$347,376.07

EXPLANATION OF ADJUSTMENTS

(a)	Returned	Determined
Stocks and Bonds, Schedule B of return:		
Item 1	\$ 30.00	31.88
Item 2	1,260.41	1,260.06
Item 5	2,136.21	2,134.94
Item 6	5,533.33	5,666.95
Item 7	5,466.67	5,600.28
Item 8	5,333.33	5,466.66
Item 9	5,200.00	5,333.60
Item 10	5,066.67	5,200.26
Item 11	5,000.00	5,066.92
Item 24	2,350.00	2,333.45
Item 33	5,480.33	5,549.33
Item 45—Accrued dividend	0.00	27.50

Estate of Ben F. Sternheim

Statement

EXPLANATION OF ADJUSTMENTS—(Continued)

(a) Continued:	Returned	Determined
Item 59	\$ 933.33	\$ 850.43
Item 64	1,293.27	1,326.67
Item 80	2,333.63	2,366.88
Item 86—Accrued dividend	0.00	83.33
Totals	<u>\$47,417.18</u>	<u>\$48,299.14</u>
Returned amount		<u>47,417.18</u>
Net estate increased		<u>\$ 881.96</u>

The finally determined values of items 1, 2, 5 to 11 inclusive, 24, 33, 59, 64 and 80, of Stocks and Bonds, Schedule B of the return, as shown above, are based upon the means between the high and low stock exchange sales prices on the applicable valuation dates. There has been added to the values of items 45 and 86, as shown above, the value of unpaid dividends that were, however, declared and payable to decedent at the date of his death.

(b)

Transfers During Decedent's Life, Schedule G of return:

First item—Dividends on 4 life insurance
policies payable to trustee of
decedent's revocable trust cre-
ated June 9, 1938.....\$ 0.00 \$392.08

Returned amount 0.00

Net estate increased\$392.08

With respect to the first item of Transfers During Decedent's Life, Schedule G of the return, consisting of four policies of life insurance, it is held that the dividends thereon in the aggregate amount

of \$392.08 payable at the date of death of decedent are not insurance proceeds subject to the specific exemption provided by section 811(g) of the Internal Revenue Code, but that the same are a taxable portion of decedent's revocable trust created by indenture dated June 9, 1938. [13]

Estate of Ben F. Sternheim

Statement

EXPLANATION OF ADJUSTMENTS—(Continued)

(c)	Returned	Determined
Charitable, Public, and Similar Gifts and Bequests, Schedule N of return:		
Items 1 to 7 inclusive.....	\$283,974.60	\$ 0.00
Amount determined deductible	0.00	
Deductions decreased		\$283,974.60

The deductions claimed under items 1 to 7, inclusive, of Charitable, Public, and Similar Gifts and Bequests, Schedule N of the return, are intended to represent the values of remainder interests passing to charitable, public or educational organizations under the terms of a revocable trust created by decedent on June 9, 1938, and under the terms of the testamentary trust created by decedent's last will and testament. In each of said trusts, however, the trustee is given the power, in its uncontrolled discretion, to use and apply such part of the principal of each trust estate, as it may consider suitable or necessary, in the interest and welfare of the individual life beneficiaries in the event of sickness, accident, want or other emergency of or to any of the individual life beneficiaries then receiving the income from the trust estate or from

any portion thereof; provided that, not more than ten per cent (10%) of the portion of the principal of the trust held for any such individual life beneficiary shall be used or applied in any one year for such purposes or any of them. Through these provisions, therefore, the trustee in each case is given the power to divert the whole of the bequests, devises and gifts to uses and purposes which would have rendered them not deductible had they been directly so bequeathed, devised or given by the decedent. Furthermore, because of said provisions, the beneficial interests of the charitable, public, or educational organizations are not severable from the interests in favor of the private uses, and are not presently ascertainable.

It is held, therefore, that these deductions are not allowable. (See section 812(d) of the Internal Revenue Code, and Articles 81.44 and 81.46 of Treasury Regulations 105.) [14]

Estate of Ben F. Sternheim

Statement

EXPLANATION OF ADJUSTMENTS—(Continued)

(d)	Returned	Determined
Funeral and Administration Expenses, Schedule J of return:		
Executor's Commissions	\$ 4,705.59	\$12,205.59
Attorneys' Fees	4,705.59	19,705.59
	<hr/>	<hr/>
Totals	\$ 9,411.18	\$31,911.18
Amount returned		9,411.18
		<hr/>
Deductions increased		\$22,500.00

Executor's commissions and Attorneys' fees are allowed as deductions, as shown above, on the basis

of affidavits of the executor and the attorneys showing that the sums allowed will be claimed and received subject to the allowance of the same by the court having jurisdiction of the administration of this estate. (See Articles 81.33 and 81.34 of Treasury Regulations 105.)

COMPUTATION OF ESTATE TAX

	Returned	Determined
Gross estate	\$420,952.57	\$422,226.61
Deductions for basic tax.....	396,325.14	134,850.54
Net estate for basic tax.....	\$ 24,627.43	\$287,376.07
Net estate for additional tax	\$ 84,627.43	\$347,376.07
Gross basic tax		\$ 7,995.04
Credit for estate and inheritance taxes....		0.00
Net basic tax		\$7,995.04
Total gross taxes (basic and additional)....	\$ 56,075.21	
Gross basic tax	7,995.04	
Net additional tax		48,080.17
Total tax payable		\$56,075.21
Amount shown on return and previously assessed:		
Oriignal, List July 1941, page 102, line 2.....		7,250.82
Deficiency of estate tax		\$48,824.39
Estate of Ben F. Sternheim		[15] Statement

Upon receipt of a waiver, or upon the expiration of 90 days from the date of this letter, if a petition is not filed with the Board of Tax Appeals, \$42,-428.36 of the deficiency will be assessed.

As the balance of the deficiency may be eliminated by credit for State estate, inheritance, legacy or succession taxes, opportunity will be accorded

for the submission of the evidence required by Article 81.9 of Treasury Regulations 105. If after a reasonable time the evidence is not filed, the balance of the deficiency will be assessed. Please advise when the credit evidence may be expected. [16]

(Duly Verified.)

[Endorsed]: U.S.B.T.A. Filed Jul. 7, 1942. [17]

[Title of Board and Cause.]

ANSWER

Comes now the Commissioner of Internal Revenue, respondent above named, by his attorney, J. P. Wenchel, Chief Counsel, Bureau of Internal Revenue, and for answer to the petition filed by the above-named petitioner admits and denies as follows:

1 and 2. Admits the allegations contained in paragraphs 1 and 2 of the petition.

3. Admits that the tax in controversy is Federal estate tax; denies the remaining allegations contained in paragraph 3 of the petition.

4(a) to (i), inclusive. Denies that the Commissioner erred as alleged in subparagraphs (a) to (i), inclusive, of paragraph 4 of the petition.

5(a) to (c), inclusive. Denies the allegations contained in subparagraphs (a) to (c), inclusive, of paragraph 5 of the petition.

5(d). Admits the allegations contained in the first sentence of subparagraph (d) of paragraph 5

of the petition; denies [18] the remaining allegations contained in subparagraph (d) of paragraph 5 of the petition.

5(e) and (f). Denies the allegations contained in subparagraphs (e) and (f) of paragraph 5 of the petition.

5(g). Admits the allegations contained in the first sentence of subparagraph (g) of paragraph 5 of the petition; denies the remaining allegations contained in said subparagraph.

5(h). Denies the allegations contained in subparagraph (h) of paragraph 5 of the petition.

5(i). Admits that said last will and testament contains provisions with respect to the payment of principal as set forth in subparagraph (i) of paragraph 5 of the petition; denies the remaining allegations contained in said subparagraph.

6. Denies generally and specifically each and every allegation in the petition not hereinbefore admitted, qualified or denied.

Wherefore, it is prayed that the Commissioner's determination be approved and the petitioner's appeal denied.

(Signed) J. P. WENCHEL

TMM

Chief Counsel,

Bureau of Internal Revenue.

Of Counsel:

ALVA C. BAIRD,

Division Counsel;

T. M. MATHER,

HARRY R. HORROW

Special Attorneys,

Bureau of Internal Revenue.

HRH:sob 7/31/42

[Endorsed]: U. S. B. T. A. Aug. 5, 1942. [19]

[Title of Board and Cause.]

LAWRENCE C. BAKER., ESQ.,

for the petitioner.

HARRY R. HORROW, ESQ.,

for the respondent.

MEMORANDUM FINDINGS OF FACT AND OPINION.

Smith, Judge. This proceeding is for the re-determination of an estate tax deficiency of \$48,824.39. The questions in issue are whether there were deductible gifts to charity of (1) the remainder interest of an inter vivos trust which the decedent created during his lifetime, naming his sister as life beneficiary with remainder over to charities; [20] and (2) the remainder interests of several testamentary trusts comprising the decedent's residuary estate which he bequeathed in

trust for the benefit of several of his relatives and a friend for life, with remainders over to charities. A third issue relates to a deduction claimed on account of the liability of the estate as transferee for an income tax deficiency of a corporation, Sternheim Co., of which decedent was the principal stockholder.

Other issues raised in the pleading have been settled by stipulation. The issues in controversy will be considered separately in the order stated.

The decedent died on April 9, 1940, a resident of San Francisco, California. The petitioner herein, as executor, filed an estate tax return on behalf of the estate with the collector of internal revenue for the first district of California on July 9, 1941.

The Inter Vivos Trust.

Findings of Fact.—Prior to his death the decedent, on June 9, 1938, transferred to the Wells Fargo Bank & Union Trust Co. of San Francisco, as trustee, policies of insurance on his life in the aggregate amount of \$20,000, and savings accounts of approximately \$73,000. The income of the trust was to be accumulated and added to principal during the life of the decedent. After his death the income was to be paid to his sister, Blanche M. Sternheim, for life. Upon her death the trust estate was to be divided among the Shriners Hospital for Crippled Children of San Francisco, Mount Zion Hospital, San Francisco, and the Community Chest of San Francisco, in whatever proportion the trustee in its sole discretion might elect. The trust agreement contained the following pro-

vision authorizing the trustee, in certain circumstances, to invade the trust principal: [21]

11. The Trustee shall have the power in its uncontrolled discretion to use and apply such part of the principal of the trust estate held for any beneficiary as it may consider suitable or necessary in the interest and for the welfare of such beneficiary in the event of sickness, accident, want, or other emergency of or to any of the beneficiaries then receiving the income from the trust estate or from any portion thereof; provided that, except as otherwise herein provided, not more than ten per cent (10%) of the principal of the trust estate shall be used or applied in any one year for said purposes of any of them.

The decedent reserved the right to amend, alter, or revoke the trust at any time during his lifetime.

The value of the trust estate at the date of decedent's death was approximately \$97,000. The present value of the assets, which now consist principally of securities, is approximately \$87,000. The trust has yielded annual net income since decedent's death of approximately \$2,100. All of this income has been paid to the life beneficiary.

At the date of decedent's death Blanche Sternheim was also the life beneficiary of a trust which she herself established in 1929. The decedent was named trustee of this trust and so served until his death. Soon thereafter the trust agreement was completely revised under the power reserved to the trustor. In the revised trust agreement Wells

Fargo Bank & Union Trust Co. was named as substitute trustee and has served as trustee up to the present time. The provisions of that trust agreement for the most part are not here material. In short, the settlor is entitled to all of the income and has a reserve power which gives her virtual control over the principal of the trust. The assets of the trust have a present value of approximately \$138,700. The net income amounts to approximately \$7,300 a year.

At the time of decedent's death Blanche Sternheim was 60 years of age and in sound health. She resides at the Hotel Californian, San Francisco, where her ordinary living expenses amount to about \$250 or [22] \$300 per month. She regularly saves from \$250 to \$300 a month out of the income which she receives from the above described trusts. She enjoys good health generally and is economical in her living habits.

After decedent's death it was discovered that he had commingled assets of his own estate and those of the trust created by Blanche Sternheim of which he was trustee. Pending a partition of the commingled assets the income distributions from that trust were suspended and Blanche Sternheim was given an allowance of \$500 a month from the corpus of the inter vivos trust which decedent had created. This allowance was made by the trustee pursuant to the emergency clause of the trust instrument and upon the agreement of Blanche Sternheim to repay the amounts so withdrawn to the trust. A total of \$1,500 was so paid to her and later repaid to the trust.

Thereafter, and at some time not disclosed by the evidence, payments of \$500 a month for a period of seven or eight months were made to Blanche Sternheim out of the principal of the inter vivos trust while the income distributions from both trusts were suspended pending settlement of an income tax controversy affecting the assets of the trusts. The income tax controversy referred to involved a transferee liability for income taxes of a corporation known as the Sternheim Co., the stock of which had all been owned by the decedent and Blanche Sternheim. The Commissioner asserted the transferee liability both against Blanche Sternheim and decedent's estate. In final settlement of the matter, and upon the insistence of Blanche Sternheim, the trustee of the inter vivos trust, which was also the executor of the decedent's estate, paid to the collector of internal revenue \$8,999.16 out of the principal of the trust in part satisfaction of her transferee liability. [23]

Opinion.—The respondent's position is that the trust provisions authorizing the invasion of the corpus for the benefit of the life beneficiary, as administered by the trustee, render the gift to charities of the remainder interest uncertain and the amount of such gift, if any, incapable of ascertainment. Petitioner's contentions are that the possibility of invasion of the trust corpus was so remote as not to affect the value of the gift of the remainder interest to charities.

In *Ithaca Trust Co. v. United States*, 279 U.S. 151, the Supreme Court held that a bequest to

charity of the remainder interest of a trust, after termination of a life estate in the testator's widow, was deductible from the gross estate as a gift to charity, notwithstanding that the trustees were authorized to expend as much of the trust corpus as necessary to maintain the widow "in as much comfort as she now enjoys." The court found that "the standard was fixed in fact and capable of being stated in definite terms of money" and that "there was no uncertainty appreciably greater than the general uncertainty that attends human affairs."

A gift to charity of the remainder interest of a testamentary trust was held deductible in *Commissioner v. Bank of America Nat. Trust & Savings Assn., Executor (Will of Elisha Cobb Mayo)*, 133 Fed. (2d) 753, where the life beneficiary, the testator's sister, was to receive a monthly payment out of the trust income, and such additional amounts out of principal as might be reasonable should accident, illness, or other circumstances require.

On authority of those and other like cases we would be constrained to hold, upon a consideration of the provisions of the trust instrument and the financial condition of the life beneficiary, that the probability [24] of an invasion of the principal of the trust, to the detriment of the gift to charities, was so remote as not seriously to affect the value of the charitable gift. However, the facts are that since decedent's death there have been invasions of the corpus of the trust. On one occasion the trustee paid Blanche Sternheim an allowance out

of the principal of the trust for ordinary living expenses during a period when payments to her of the income from that trust, as well as the trust which she herself had created, were suspended pending settlement of matters affecting the assets of the trusts. The amount of the allowance was approximately \$3,700. The corpus of the trust was again invaded to the extent of \$8,999.16 for the purpose of paying a portion of Blanche Sternheim's transferee liability for the income taxes of the Sternheim Co. The record is not clear upon what authority the trustee permitted those withdrawals from the principal of the trust. The only explanation of record is that the withdrawals were made pursuant to the emergency clause of the trust agreement. A trust officer of the trustee bank, who handled the affairs of the trust, testified that the \$8,999.16 payment was made as a compromise and because of the probable transferee liability of the trust for the full amount of the tax deficiency of the Sternheim Co. However that may be, we can not overlook these subsequent events in determining the probability of an invasion of the trust corpus as of the date of decedent's death. We can not say, in the light of these facts, that the probability of an invasion of the trust corpus was so remote as not to affect the value of the gift of the remainder interest to charities..

There is no question between the parties but that gifts made to the charities named in the trust instrument would be deductible from the gross estate. The respondent has disallowed the deduction

of the entire value [25] of the remainder interest to charities upon the ground that the value of the gift is incapable of ascertainment. We think, however, that this is wrong. Blanche Sternheim, the beneficiary of the inter vivos trust, had a limited life expectancy. Even if the trust principal was invaded each year to the extent of 10 per cent of the then principal there would still be a remainder interest which would go to the charities named. In the circumstances of the case we think it must be assumed that the principal of the inter vivos trust was liable to be invaded to the extent of 10 per cent of the principal each year during the life expectancy of Blanche Sternheim. The remainder interest to charities, which can be determined by reference to standard mortality tables, is deductible from the gross estate.

The Testamentary Trusts.

Findings of Fact.—The decedent bequeathed the residue of his estate to Wells Fargo Bank & Union Trust Co. in trust, directing the trustee to divide the residuary estate into six equal parts and to hold one of such parts in trust for the benefit for life of a cousin living in Berlin, Germany; another for the benefit for life of a cousin living in Duisburg, Germany; another part for the benefit for life of a cousin living in San Francisco, and the remaining three parts for the benefit for life of a friend living in San Francisco. Each of the beneficiaries was entitled to receive all of the income from his or her trust for life and in addi-

tion the trustee was empowered in its sole discretion to invade the corpora of the trusts upon the same conditions and with the same limitations as in the inter vivos trust, as set out above. The three first mentioned life beneficiaries of decedent's residuary trust estate were 73, 71, and 74 years of age, respectively, at the time of decedent's death. The other life beneficiary was 61 years of age. [26]

The appraised gross value of decedent's estate as of the date of his death was \$387,558.86. The estimated value of the assets of the estate as of January 26, 1943, was \$188,623.97. The shrinkage in value between those dates was due to the payment of claims against the estate of \$11,887.47; administration expenses of \$10,000; inheritance taxes of \$12,000; claims for individual income tax of decedent upon the income tax liability of Sternheim Co. \$114,376.63; and depreciation in the market value of the assets of the trust in the amount of approximately \$50,000. This value of \$188,623.97 does not take into account unpaid claims for additional executor's commissions and attorneys' fees estimated in the deficiency notice of \$22,500.

Because of unsettled tax claims the estate has not yet been closed and there has been no transfer of the residuary estate to the testamentary trustee. A total of \$28,478.77 of income of the estate has been distributed to the beneficiaries of the testamentary trusts by the executor pursuant to order of the probate court. The estimated an-

nual net income of decedent's estate as now constituted is approximately \$7,000.

Opinion.—The evidence of record does not show what independent funds or income of their own any of the beneficiaries of the testamentary trusts had at the time of decedent's death, nor any of the other circumstances which might determine the probability of invasion of the corpora of the trusts under the emergency provisions of the will. We must assume therefore that, as in the case of inter vivos trust, the corpus of each of the testamentary trusts was subject to the full amount of the payments to the beneficiary authorized by the will. Not more than 10 percent of the corpus of any of the trusts could be so paid out in any year. The [27] beneficiaries were all of advanced ages. Based on mortality tables the remainder interest that was certain to go to charity is capable of definite determination. We think that the value of the remainder interests so computed is deductible from the gross estate.

Deduction claimed on account of liability as transferee for income tax of Sternheim Co.

Findings of Fact.—After decedent's death the respondent asserted against his estate a transferee liability for a large amount of income taxes of a corporation known as the Sternheim Co. Decedent had owned two-thirds of the stock of that company and the remaining one-third had been owned by his sister, Blanche Sternheim. The respondent asserted transferee liability for the taxes of the Sternheim

Co. against the sister also. She and the representatives of decedent's estate tentatively agreed that, with a minor adjustment, they would bear the burden of the Sternheim Co. taxes in the proportion of stock ownership, and the asserted liability was settled accordingly. Thereafter, the respondent determined a further deficiency against Sternheim Co. of some \$28,000 which he likewise asserted against decedent's estate, and also against Blanche Sternheim. The latter protested her liability for any such additional taxes and insisted that in any event her portion should be paid out of the funds of the inter vivos trust which decedent had created for her benefit. In final settlement of the matter \$8,999.16 of the additional liability was paid out of the assets of the inter vivos trust. The amount finally paid by decedent's estate was \$2,000 in excess of its two-thirds portion of the asserted liability. This \$2,000 is said to have been allowed to Blanche Sternheim to reimburse her in part for attorneys' fees incurred in settling the tax controversy. The executor [28] of decedent's estate agreed to this settlement upon advice of counsel and for reasons which is considered advantageous to the estate.

Opinion.—Petitioner contends that it is entitled to deduct from the gross estate not only the amount of the Sternheim Co. tax liability which was paid out of the assets of the estate but also the amount that was paid out of the assets of the inter vivos trust on behalf of Blanche Sternheim. Respondent contends that the estate is entitled to the deduction of only two-thirds of the total amount of the Stern-

heim Company's tax deficiency. His contentions are that since decedent owned only two-thirds of the stock of Sternheim Co. his estate is entitled to the deduction of only two-thirds of the company's tax liability; and that in no event can the estate claim a deduction on account of that portion of the liability which was paid out of the assets of the inter vivos trust estate.

Section 812 of the Internal Revenue Code provides for the deduction from the gross estate, in determining the value of the net estate, of such claims against the estate as are allowed by the laws of the jurisdiction under which the estate is being administered, with certain exceptions not here material.

If the decedent's estate had been solely liable for the entire amount of the tax deficiency of the Sternheim Co. and had paid or had lawfully assumed payment of the full amount, without any right of contribution from others, then undoubtedly it would be entitled to deduct the full amount as a claim against the estate. The facts are, however, that Blanche Sternheim as a one-third stockholder of the taxpayer corporation admitted her liability for one-third of the company's tax deficiency and paid her portion of the liability, as first determined by the respondent, on that basis. It [29] is not shown that the executor of decedent's estate ever admitted any obligation to pay more than two-thirds of the asserted liability. It did agree to pay \$2,000 over and above its two-thirds portion for the purpose, it is said, of assisting Blanche Sternheim in

paying her attorneys' fees in connection with the matter. That amount and the further amount of \$8,999.16 which was paid out of the funds of the inter vivos trust, constituted excess over the two-thirds portion allocated to decedent's estate and are the specific amounts now in controversy.

We think that the respondent properly disallowed the deduction of that portion of the transferee liability that was paid out of the funds of the inter vivos trust. Apparently decedent's estate would have been entitled to a contribution from Blanche Sternheim for any payment in excess of its two-thirds portion of the liability. See *Phillips-Jones Corporation v. Parmley*, 302 U.S. 233. The Supreme Court in that case said:

Since the enactment of section 280, as before, a bill in equity against a stockholder transferee is a remedy available to the Commissioner to enforce the tax liability of the corporation. *Leighton v. United States*, 289 U.S. 506, 53 S. Ct. 719, 77 L. Ed. 1350; *Hulburt v. Commissioner*, 296 U.S. 300, 303, 56 S. Ct. 197, 199, 80 L. Ed. 242. If he had resorted to that remedy he could have sued Phillips alone (see *Phillips v. Commissioner*, *supra*, 283 U.S. 589, at pages 603, 604, 51 S. Ct. 608, 614, 75 L. Ed. 1289); and if thereupon Phillips had paid the entire tax, obviously he could have brought a bill in equity against the other stockholders for contribution. The right is no less where the Commissioner proceeds under section 280. This statute does not affect the

duty of other stockholder transferees to contribute; it merely provides the Commissioner with a summary remedy for enforcing existing tax liability. * * *

Blanche Sternheim had ample funds of her own with which to pay her full portion of the transferee liability. It is not clear what right she had to demand that the funds of the inter vivos trust be used for that purpose nor upon what authority the trustee permitted it. In his testimony [30] the trust officer of the trustee bank described it as a compromise settlement. The principal of the trust belonged neither to Blanche Sternheim nor to the decedent's estate. The remainder interest of the trust, after the life estate of Blanche Sternheim, was to go to named charities. The value of the trust was includable, in part, in decedent's gross estate because the trust was a revocable trust, but the trust assets did not pass to the executor and were not subject to probate as a part of decedent's estate. However that may be, we think that the respondent correctly disallowed the deduction of the \$8,999.16 from decedent's gross estate.

The situation is somewhat different as to the \$2,000 item. That amount also was over and above the two-thirds portion of the transferee liability allocable to the decedent's estate. Undoubtedly if the executor of decedent's estate had been required to pay more than two-thirds of the Sternheim Company's taxes because of its liability as a transferee it would have had a right against Blanche Sternheim for a contribution of the excess amount.

Equitably Blanche Sternheim was liable for at least one-third of the Sternheim Company's unpaid taxes. In these circumstances we do not think that it can be said that the \$2,000 item was a deductible liability of, or claim against, the estate.

Decision will be entered under Rule 50.

Entered Jun 24 1943 [31]

The Tax Court of the United States
Washington

Docket No. 111776

ESTATE OF BEN F. STERNHEIM, Deceased,
WELLS FARGO BANK & UNION TRUST
CO., Executor,

Petitioner,

v.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

DECISION

Pursuant to the Court's Memorandum Findings of Fact and Opinion, entered June 24, 1943, the respondent having filed a recomputation of tax on August 14, 1943, and petitioner having filed an acquiescence therein on September 2, 1943, it is

Ordered and Decided: That there is a deficiency in estate tax of \$16,450.04.

Entered Sep - 3 1943

(Signed) J. E. MURDOCK

Judge. [32]

In the United States Circuit Court of Appeals
For the Ninth Circuit

Docket No. 111776

ESTATE OF BEN F. STERNHEIM, Deceased,
WELLS FARGO BANK & UNION TRUST
CO., Executor,

Petitioner on Review

v.

COMMISSIONER OF INTERNAL REVENUE,
Respondent on Review

PETITION FOR REVIEW

Estate of Ben F. Sternheim, deceased, Wells Fargo Bank & Union Trust Co., Executor, hereby petitions the United States Circuit Court of Appeals for the Ninth Circuit to review the decision entered by the Tax Court of the United States on September 3, 1943, that there is a deficiency in estate tax of \$16,450.04 due from the estate of Ben F. Sternheim (date of death, April 9, 1940). This petition for review is filed pursuant to the provisions of Sections 1141 and 1142 of the Internal Revenue Code.

I.

Jurisdiction

Wells Fargo Bank & Union Trust Co. of San Francisco, California, is the duly appointed, qualified and acting executor of the will of the decedent.

The estate tax return made [33] on behalf of decedent's estate was filed with the Collector of Internal Revenue for the First District of California, whose office is located at San Francisco, California, which is within the jurisdiction of the United States Circuit Court of Appeals for the Ninth Circuit.

II.

Nature of the Controversy

Prior to his death decedent, on June 9, 1938, transferred to Wells Fargo Bank & Union Trust Co., as trustee under a revocable inter vivos trust, certain insurance policies and savings bank accounts. The income from the trust estate was payable to the decedent during his lifetime, and after his death to his sister during her lifetime. Upon the death of said sister the trust is to terminate and the corpus of the trust estate is to be distributed among designated charitable institutions. Paragraph 11 of the trust agreement provides as follows:

“The Trustee shall have the power in its uncontrolled discretion to use and apply such part of the principal of the trust estate held for any beneficiary as it may consider suitable or necessary in the interest and for the welfare of such beneficiary in the event of sickness, accident, want, or other emergency of or to any of the beneficiaries then receiving the income from the trust estate or from any portion thereof; provided that, except as otherwise herein provided, not more than ten per cent

(10%) of the principal of the trust estate shall be used or applied in any one year for said purposes or any of them.”

Under the provisions of decedent's last will and testament the residue of his estate was divided into four [34] separate trusts. The income from each trust is payable to designated life beneficiaries, and upon the death of each life beneficiary the trust for his or her benefit is to terminate and the corpus thereof is to be distributed among charitable institutions. The will contains a provision for resort to the corpus of each trust in the event of sickness, accident, want or other emergency of or to each life beneficiary, in terms substantially similar to those hereinbefore quoted from the inter vivos trust agreement.

In the estate tax return made on behalf of the decedent's estate, the executor aforesaid claimed a deduction from the gross estate in the amount of the value of the remainder interest in the corpus of the aforesaid inter vivos trust and in the amount of the remainder interest in the aforesaid testamentary trust. Based upon the provision hereinbefore quoted and the similar provision in decedent's will authorizing resort to corpus of the trusts for the specified purposes, the Commissioner disallowed the claimed deduction.

The Memorandum Findings of Fact and Opinion of the Tax Court erroneously held that the estate was not entitled in full to the claimed deduction in the amount of the value of the remainder of the inter vivos trust, and the final order of redeter-

mination of the deficiency was entered on September 3, 1943, in which the Tax Court erroneously decided that there was a deficiency in the estate tax in the sum of \$16,450.04. [35]

III.

Assignments of Error

Estate of Ben F. Sternheim, deceased, Wells Fargo Bank & Union Trust Co., Executor, being aggrieved by certain of the conclusions of law set forth in the decision of the Tax Court and by its order of redetermination of the deficiency in estate tax, desires to obtain a review thereof by the United States Circuit Court of Appeals for the Ninth Circuit.

The assignments of error are as follows:

1. The Tax Court erred in holding and deciding that the estate is not entitled to a deduction from the decedent's gross estate in the amount of the full value of the remainder interest in charitable institutions created by the revocable inter vivos trust agreement.

2. The Tax Court erred in not holding and deciding that the estate is entitled to a deduction from the decedent's gross estate in the amount of the full value of the remainder interest in charitable institutions created by the revocable inter vivos trust agreement.

3. The Tax Court erred in holding and deciding that the fact that payments were made from the corpus to the life tenant of the revocable inter vivos trust subsequent to the date of the death of the decedent, as the result of events which occurred

subsequent to the date of the death of the decedent, disentitled the estate to a deduction from the [36] decedent's gross estate in the amount of the full value of the remainder interest in charitable institutions created by the revocable inter vivos trust agreement.

4. The Tax Court erred in not holding and deciding that the fact that payments were made from the corpus to the life tenant of the revocable inter vivos trust subsequent to the date of the death of the decedent, as the result of events which occurred subsequent to the date of the death of the decedent, did not disentitle the estate to a deduction from the decedent's gross estate in the amount of the full value of the remainder interest in charitable institutions created by the revocable inter vivos trust agreement.

5. The Tax Court erred in entering its order of redetermination that there is a deficiency in the estate tax in the amount of \$16,450.04.

Wherefore, petitioner herein prays that this honorable Court may review said findings of fact and opinion and decision of the Tax Court of the United States, and that appropriate action be taken to the end that the errors herein complained of may be reviewed and corrected by said Court.

F. M. McAULIFFE,

L. C. BAKER,

Counsel for Petitioner on Review. [37]

(Duly Verified.)

[Endorsed]: T.C.U.S. Filed Nov. 9, 1943. [38]

[Title of Circuit Court of Appeals and Cause.]

NOTICE OF FILING PETITION
FOR REVIEW

To Hon. J. P. Wenchel, Chief Counsel, Bureau of
Internal Revenue:

You are hereby notified that Estate of Ben F. Sternheim, deceased, Wells Fargo Bank & Union Trust Co., executor, did, on the 9th day of November, 1943, file with the Clerk of the Tax Court of the United States, at Washington, D. C., a petition for review by the United States Circuit Court of Appeals for the Ninth Circuit, of the decision of the Tax Court heretofore rendered in the above entitled cause.

A copy of the petition for review and the assignments of error as filed is hereto attached and served upon you.

Dated: this 9th day of November, 1943.

(S) F. M. McAULIFFE,

(S) L. C. BAKER,

Counsel for Petitioner on Review.

Personal service of the above and foregoing notice, together with a copy of the petition for review and assignments of errors mentioned therein, is hereby acknowledged this 9th day of November, 1943,

(S) J. P. WENCHEL,

Chief Counsel, Bureau of Internal Revenue, Attorney for Respondent on Review.

[Endorsed]: T.C.U.S. Filed Nov. 9, 1943. [39]

[Title of Board and Cause.]

EXCERPTS FROM
TRANSCRIPT OF TESTIMONY

Hearing at San Francisco, Calif.

Date February 2, 1943

FRANK J. BRICKWEDEL

was called as a witness for and on behalf of the Petitioner, and having been first duly sworn was examined and testified as follows:

Judge Smith: Give your name to the reporter.

The Witness: Frank J. Brickwedel, B-r-i-c-k-w-e-d-e-l.

Direct Examination

By Mr. Baker:

Q. Where do you reside, Mr. Brickwedel?

A. 2121 Sacramento Street, San Francisco.

Q. What is your occupation?

A. Vice President and Trust Officer of Wells Fargo Bank & Union Trust Co.

Q. How long have you occupied that position?

[41]

A. For about 16 years.

Q. And you have been with the bank for what period of time?

A. Oh, since 1903.

Q. Yes. Now, Mr. Brickwedel, Wells Fargo Bank & Union Trust Co. is the duly-appointed, qualified, and acting executor of the last will and testament of Ben F. Sternheim, deceased, is it not?

(Testimony of Frank J. Brickwedel.)

A. It is.

Q. Mr. Brickwedel, I show you a document which purports to be a copy of the last will and testament of Ben F. Sternheim, deceased, and ask you if that is a full, true and correct copy of his will?

A. (Examining document): I believe it is.

Mr. Baker: Yes. I will offer this in evidence, if your Honor please, as Petitioner's first exhibit.

Mr. Horrow: No objection, your Honor.

Judge Smith: It will be marked Petitioner's Exhibit 1 and received in evidence.

(Last will and testament referred to marked Petitioner's Exhibit No. 1 and received in evidence.) [42]

PETITIONER'S EXHIBIT No. 1

I, Ben F. Sternheim, a resident of the City and County of San Francisco, State of California, being of sound and disposing mind and memory and not acting under duress, menace, fraud or the undue influence of any person whomsoever, do make, publish and declare this to be my last Will and Testament in manner following, that is to say:

Article I

I hereby revoke all former Wills and Codicils to Wills by me made.

Article II

I nominate and appoint Wells Fargo Bank & Union Trust Co. executor of this, my last Will and

(Testimony of Frank J. Brickwedel.)

Testament, and trustee of the trusts herein created. I give unto my said executor and trustee full power and authority to sell at public or private sale (for cash or on terms), improve, lease (without restriction or limit as to term), mortgage, convey in trust, pledge, hypothecate, transfer, exchange, compromise, surrender or otherwise deal with or dispose of any of my property, with or without notice, and without the necessity of obtaining the Order of any Court therefor, and confer upon my said trustee in addition to the foregoing, full power and authority (a) to hold all stocks, bonds, securities and any other property which may constitute a part of my estate; (b) to invest and reinvest the proceeds therefrom in such property, real or personal, as my trustee shall deem fit and proper, without being restricted to investments prescribed or authorized by law as trustees' investments; (c) to exercise any right or option of subscription or otherwise which

[In Margin]: B.F.S.

(Page One)

may at any time attach, belong or be given to the holders of any stocks, bonds, securities or other instruments in the nature thereof forming part of the trust estate, and to join in any plan of lease, mortgage, consolidation, reorganization or foreclosure of any corporation, trust or organization, or the property or assets thereof, including the deposit of bonds, securities and stock with any bondholders', stockholders' or protective committee in which the trust estate may hold stocks or bonds or other securities, and to take and hold any securities issued

(Testimony of Frank J. Brickwedel.)

under such plan and to pay any assessments thereunder; (d) to enforce any mortgage or deed of trust or pledge held hereunder and to purchase at any sale thereunder any property subject thereto; (e) to hold any securities in bearer form or in the name of the trustee or of any nominee of the trustee, and to exercise any of the powers set forth herein through such nominee.

Article III

I give and bequeath, outright, unto my sister, Blanche M. Sternheim, all my personal effects, clothing, jewelry, household furniture and furnishings, and any automobile or automobiles which I may own at the time of my death, with the suggestion to her that (after making her own selection) she may desire to distribute a portion or portions of the foregoing items among my relatives or friends. No other provision is made for my said sister, Blanche M. Sternheim, inasmuch as I have made ample provision for her by other means.

Article IV

I give and bequeath unto Max Kahn, of 611 Mills Building, San Francisco, California, the sum of Two Thousand Dollars (\$2,000), and in addition thereto all my office furniture located at said address.

[In Margin]: B.F.S.

(Page Two)

(Testimony of Frank J. Brickwedel.)

Article V

I give and bequeath unto the Congregation Emanu-El the sum of Two Thousand Dollars (\$2,000) for Perpetual Care Fund of the Family Plot in Home of Peace Cemetery.

Article VI

I give and bequeath unto Mrs. George A. Fischer, 2424 Alemany Boulevard, San Francisco, California, the sum of One Thousand Dollars (\$1,000).

Article VII

I give, devise and bequeath all the rest, residue and remainder of my estate of whatsoever kind or character and wheresoever situate unto Wells Fargo Bank & Union Trust Co., my said trustee, in trust, nevertheless, for the following uses and purposes:

My trustee shall divide the entire balance of my said estate into six parts as nearly equal as possible, and shall hold, administer and distribute said parts as hereinafter provided.

The Trustee shall hold one of such equal parts for the use and benefit of my cousin Carrie Blattner of Brandenburgische str. 38, Berlin W15, Germany, and shall pay to her the entire net income, revenue and profit therefrom in the form of marks or other suitable currency, and upon her death the trust shall cease and terminate as to such part and the principal thereof shall vest in and go to the Pacific Hebrew Orphan Asylum & Home Society and to the Federation of Jewish Charities, in the name of and

(Testimony of Frank J. Brickwedel.)

as a memorial to my mother, Rosie Sternheim, in the portions and amounts to be decided in the sole, uncontrolled and absolute discretion of my trustee

[In Margin]: B.F.S.

(Page Four)

upon considering the then existing needs of the said organizations and institutions.

My trustee shall hold the second of such equal parts for the use and benefit of my cousin, Julius Fleischer, of Hondenburg str. 72, Duisburg, Germany, and shall pay to him the entire net income, revenue and profit therefrom in the form of marks or other suitable currency, and upon his death the trust shall cease and terminate as to such part and the principal thereof shall vest in and go to Eureka Benevolent Society, Hebrew Home for the Aged Disabled, and Children's Hospital, of San Francisco, in the name of and as a memorial to my mother, Rosie Sternheim, in the portions and amounts to be decided in the sole, uncontrolled and absolute discretion of my trustee upon considering the then existing needs of the said organizations and institutions.

My trustees shall hold the third of such equal parts for the use and benefit of my cousin, Lena Kohlman, of Hotel Glen Royal, 940 Sutter Street, San Francisco, California, and shall pay to her the entire net income, revenue and profit therefrom, and upon her death the trust shall cease and terminate as to such part and the principal thereof shall vest in and go to the Salvation Army, of San Francisco, San Francisco Nursery for Homeless

(Testimony of Frank J. Brickwedel.)

Children, Childrens Protective Society of San Francisco, Travelers Aid Society of San Francisco, San Francisco Society for the Prevention of Cruelty to Animals, and Children's Home Society of California, in the portions and amounts to be decided in the sole, uncontrolled and absolute discretion of my trustee upon considering the then existing needs of the said organizations and institutions.

My trustee shall hold the three remaining parts for the use and benefit of Helene M. Opet, a life-long friend, residing at 1245 California Street, San Francisco, California, and shall pay to her the en-

[In Margin]: B.F.S.

(Page Four)

tire net income, revenue and profit therefrom, and upon her death the trust shall cease and terminate as to such parts and the principal thereof shall vest in and go to the Regents of the University of California and the Board of Trustees of Leland Stanford Jr. University (to be known as the Rosie Sternheim Scholarships Memorial, to provide scholarships for needy students) in the portions and amounts to be decided in the sole, uncontrolled and absolute discretion of my trustee upon considering the then existing needs of the said institutions.

All of the foregoing life beneficiaries shall receive the net income from the parts held for them from the date of my death.

My trustee shall apply the entire net income of all securities held by it hereunder to the use of the beneficiaries hereof, irrespective of the price paid for said securities or irrespective of their market

(Testimony of Frank J. Brickwedel.)

value at any time, it being intended hereby that no part of such income shall be applied as a sinking fund or otherwise to offset the gradual loss of premium upon the market value or purchase price of such securities. All stock dividends (other than those expressly stated by the declaring corporation to be out of current earnings) and amounts received upon the sale of Rights to Subscribe for stocks or any profit accruing from the exercise of such Rights shall be credited to principal and added to the trust estate and be held as a part thereof.

My trustee shall have the power in its uncontrolled discretion to use and apply such part of the principal of the trust estate held for any beneficiary as it may consider suitable or necessary in the interest and for the welfare of such beneficiary in the event of sickness, accident, want or other emergency of or to any of the beneficiaries then receiving the income from the trust estate or from any portion thereof; provided that, except as otherwise herein provided, not more than ten per cent (10%) of the portion of the principal of the trust held for any beneficiary shall be used or applied in any one year for said purposes or any of them.

[In Margin]: B.F.S.

(Page Five)

All income or principal to be paid to any of the beneficiaries named herein shall be paid by the trustee direct and only to said beneficiaries. My trustee is not to recognize any transfer, mortgage, pledge, hypothecation, order or assignment of any beneficiary by way of anticipation of any part of

(Testimony of Frank J. Brickwedel.)

the income or principal. The principal and income of the trust estate shall not be subject in any manner to transfer by operation of law unless otherwise herein provided, and shall be exempt from the claims of creditors or other claimants and from orders, decrees, levies, attachments, garnishments and executions and other legal or equitable process or proceedings to the fullest extent permissible by law.

Article VIII.

I direct that all taxes including inheritance and Federal Estate Taxes which may be chargeable against my estate or against the gifts, devises and bequests and interests under this Will, shall be paid out of the general assets of my estate, it being my intention that each and every gift, devise and bequest under this Will shall be delivered to and taken by each devisee, legatee and beneficiary hereunder in full without deduction on account of any such taxes.

Article IX.

I hereby declare that I have never been married and have never been a parent of a child in or out of wedlock, and that no claim to the contrary has ever been made by any one during my life.

I have purposely made no provision for any other person whether claiming to be an heir of mine or not, and if any person whether a beneficiary under this Will or not mentioned herein shall contest

[In Margin]: B.F.S.

(Page Six)

this, my last Will and Testament (which shall in-

(Testimony of Frank J. Brickwedel.)

clude any Codicil hereto), or object to or oppose the probate thereof, or take any proceeding before any Court to annul any provision thereof or have any provision thereof declared void or to have the probate thereof revoked, or should any such person if requested so to do by my executor decline to join in the application for the probate of this, my last Will and Testament, or decline to assent to the probate thereof, then and in any such event I direct that all interest of such person in or under this, my last Will and Testament, as a legatee or devisee or beneficiary of any trust shall cease and become void, and if such person shall be successful in a Court of final jurisdiction, I give and bequeath the sum of Five Dollars (\$5.00) to such person, and the sum or property or benefit such person would have received under said Will and all sums or property provided to be held in trust for his or her use shall be added to the residue of my estate and shall be distributed to the beneficiaries of such residue as herein provided in the same shares and in the same manner as if such person so offending against the provisions of this paragraph had died at that time without heirs.

In Witness Whereof I have hereunto set my hand and seal this 17th day of June, in the year One Thousand Nine Hundred and Thirty-eight.

BEN F. STERNHEIM

(Page Seven)

The foregoing instrument consisting of seven (7) pages besides this page was at the date thereof by

(Testimony of Frank J. Brickwedel.)

the said BEN F. STERNHEIM signed and sealed and published as and declared to be his last Will and Testament in the presence of us, who, at his request and in his presence and in the presence of each other, have subscribed our names as witnesses thereto.

LOUIS HEILBRON

Residing at 1865 California St., San Francisco, Calif.

LAWRENCE C. BAKER

Residing at 2805 Green St., San Francisco, Calif.

[Endorsed]: T.C.U.S. Filed Feb. 2, 1942.

(Page Eight)

By Mr. Baker:

Q. Now, Mr. Brickwedel, during his lifetime did the decedent, Ben Sternheim, create a revocable inter vivos trust naming Wells Fargo Bank & Union Trust Company as trustee? [43]

A. He did.

Q. And do you know the nature of the assets which he transferred at that time to you as trustee?

A. I do.

Q. Will you please state what they were?

A. Life insurance and savings accounts representing funds on deposit.

Q. What was the amount of the life insurance, if you know?

A. I don't recall that figure.

(Testimony of Frank J. Brickwedel.)

Q. Do you know the value of the trust as it was then constituted when Mr. Sternheim transferred the assets to you as trustee?

A. Going back to the previous question, there were four policies of life insurance on the life of Ben F. Sternheim, each in the amount of \$5,000.

Q. So that the amount of insurance was \$20,000?

A. Yes, sir.

Q. And the rest of the estate was in cash?

A. Well, it was represented by savings books.

Q. Yes.

A. Books issued by banks for savings deposits and there were approximately \$73,000 of funds so represented.

Q. So that the total value of the estate at that time was approximately \$93,000? [44]

A. Well, if we include the policies at their death indemnity values.

Q. Yes. A. Yes.

Q. What was the value of the estate at the time of the death of Ben Sternheim?

A. I don't think I brought that figure.

Mr. Horrow: Counsel, I have the estate tax return filed by the estate which shows the amounts in the savings accounts at the date of death. I intend to place the return in evidence so that it will disclose the value of the inter vivos trust at the date of death.

There is no dispute as to that.

Mr. Baker: No. Thank you, Mr. Horrow.

(Testimony of Frank J. Brickwedel.)

Our value is \$94,046.26. Does that correspond with your figures?

Mr. Horrow: Well, the estate tax return shows savings accounts totalling \$76,928.86 together with insurance of \$20,000.

Mr. Baker: Well, I am willing to accept that amount as being correct, \$96,000-odd.

By Mr. Baker:

Q. Mr. Brickwedel, I show you a document which purports to be a copy of the trust instrument covering the trust created by Ben Sternheim during his lifetime, that is, [45] the living trust, and ask you if that is a true and correct copy of that document, of the original document?

A. (Examining document): True and correct except that it does not include the exhibit referred to in it.

Q. Yes, but it does set forth fully the terms and provisions of the agreement?

A. Yes, sir.

Mr. Baker: I will offer this document in evidence as Petitioner's exhibit next in order.

Mr. Horrow: No objection.

Judge Smith: It will be marked Petitioner's Exhibit 3 and received in evidence.

(Trust instrument referred to marked Petitioner's Exhibit No. 3 and received in evidence.)

PETITIONER'S EXHIBIT No. 3.

This Agreement, made and entered into this 9th day of June, 1938, by and between Ben F. Stern-

(Testimony of Frank J. Brickwedel.)

Petitioner's Exhibit No. 3—(Continued)

heim, hereinafter referred to as "Trustor", and Wells Fargo Bank & Union Trust Co., a corporation organized and existing under and by virtue of the laws of the State of California, hereinafter referred to as "Trustee".

Witnesseth:

Whereas, certain life insurance policies have been or are about to be issued upon the life of the Trustor wherein said Trustee has been or will be designated as beneficiary, a list of which policies is attached hereto and marked Exhibit "A", and by reference made a part hereof; and

Whereas, the Trustor desires to provide for the collection and disposition of the proceeds of said policies by the Trustee; and

Whereas, the Trustor has transferred, assigned and set over unto the Trustee and does by these presents so transfer, assign and set over, all that certain personal property described and set forth in Exhibit "B" attached hereto and by reference made a part hereof; and

Whereas, the Trustor desires to provide the terms and conditions upon which said personal property shall be held by the Trustee;

Now, Therefore, in order to define the terms and trusts upon which the Trustee shall hold the said policies and the proceeds thereof, and shall hold the said property, it is agreed as follows, to-wit:

1. The Trustee shall not be obligated to pay any

(Testimony of Frank J. Brickwedel.)

Petitioner's Exhibit No. 3—(Continued)

premiums or assessments or make any other payments on said policies, and the Trustee shall have no obligation in respect to the said policies or other property held under the terms of this agreement except to the extent expressly agreed to herein.

2. Upon receiving proof of the death of the Trustor or that said policies have matured, the Trustee shall use its best efforts to collect and receive any and all sums of money payable thereunder, and may in its discretion institute any action at law or suit in equity for that purpose, but shall not be obligated so to do. The sums so collected shall become a trust fund or be added to any trust fund existing hereunder, and held, invested, and disposed of according to the provisions of this agreement.

3. Should the Trustee receive or collect the proceeds of said policies or any of them, or any dividends or payments thereon during the lifetime of the Trustor, the amount or amounts so received or collected shall be paid immediately by the Trustee to the Trustor, who may, however, by directions in writing instruct the Trustee to hold said proceeds as a trust fund subject to the provisions of this agreement.

4. The Trustee may receive any other property, real or personal, including the proceeds of other life insurance policies or other insurance policies, from the Trustor or from any other person or per-

(Testimony of Frank J. Brickwedel.)

Petitioner's Exhibit No. 3—(Continued)

sons, or under the last will and testament of the Trustor or of any other person or persons, to be held by the Trustee subject to the terms of this agreement.

5. During the lifetime of the Trustor, the Trustee shall not be obligated to make any payments on account of the real property constituting a part of the trust estate herein created, except that the Trustee shall from time to time during the continuance of the trust created herein collect the income from such real property.

2.

6. The Trustee shall have full power and authority (a) to hold and retain in its discretion any of the property coming into its possession hereunder in the same form of investment as that in which it is received by it (except that any moneys received by it hereunder to become part of a trust fund shall be forthwith invested in accordance with the terms hereof); (b) to exercise any right or option of subscription or otherwise which may at any time attach, belong, or be given to the holders of any stocks, bonds, securities, or other instruments in the nature thereof forming part of the trust estate, and to join in any plan of lease, mortgage, consolidation, reorganization, or foreclosure of any corporation, trust, or organization, or the property or assets thereof, including the deposit of bonds, securities, and stock with any bondholders',

(Testimony of Frank J. Brickwedel.)

Petitioner's Exhibit No. 3—(Continued)

stockholders', or protective committee in which the trust estate may hold stocks or bonds or other securities, and to take and hold any securities issued under such plan and to pay any assessments thereunder; (c) to enforce any mortgage or deed of trust or pledge held hereunder and to purchase at any sale thereunder any property subject thereto; (d) to purchase securities or property from and to make loans and advancements, secured or unsecured, to the executor or other representative of the Trustor's estate, without responsibility for any loss resulting therefrom; (e) to sell at public or private sale (for cash or on terms), improve, lease (without restriction or limit as to term), mortgage, convey in trust, pledge, hypothecate, transfer, exchange, compromise, surrender, or otherwise deal with the whole or any part of the trust property upon such terms and conditions as said Trustee in its discretion may deem advisable; (f) to hold any securities in bearer form or in the name of the

3.

trustee or of any nominee of the Trustee, and to exercise any of the foregoing powers through such nominee; (g) to invest and reinvest any of the trust property held hereunder in such amounts and in such property, real or personal, as the Trustee shall deem fit and proper, without being restricted to investments prescribed or authorized by law as trustees' investments.

7. The Trustee shall amortize any premium paid

(Testimony of Frank J. Brickwedel.)

Petitioner's Exhibit No. 3—(Continued)

in the purchase of bonds for the trust estate by setting aside so much of the income from each such bond purchased at a premium as shall be reasonably necessary to prevent diminution of the principal of the trust estate upon the redemption or payment of such bond. All stock dividends (other than those expressly stated by the declaring corporation to be out of current earnings) and amounts received upon the sale of Rights to Subscribe for stocks, or any profit accruing from the exercise of such Rights, shall be credited to principal and added to the trust estate and be held as a part thereof.

8. The Trustor shall have the power at any time during his lifetime by an instrument in writing delivered to the Trustee to modify, alter, revoke, or terminate this agreement in whole or in part and to withdraw any policies or to surrender the same for the surrender value thereof or for other policies or other insurance, or to borrow money thereon (and the Trustee is empowered to join in or execute any documents or releases required by any insurance company), or to withdraw or borrow money on the security of any other property which is subject to this trust agreement; provided, however, that, except as to revocation of this agreement or the withdrawal or surrender of policies or the borrowing of money thereon, or the withdrawal of or borrowing of money on any other property, the duties,

4.

powers, and liabilities of the Trustee hereunder

(Testimony of Frank J. Brickwedel.)

Petitioner's Exhibit No. 3—(Continued)

shall not be substantially changed without the written consent of the Trustee.

9. The Trustee may resign and discharge itself of the trust created hereunder during the lifetime of the Trustor, but such resignation shall not become effective until thirty (30) days after written notice is given to the Trustor by the Trustee, and in the event of the death of the Trustor during said thirty (30) day period said resignation shall be ineffective.

10. The Trustee shall hold the trust estate upon the following trusts and purposes:

(a) During the entire lifetime of the Trustor, the income from the trust estate shall be accumulated and added to the principal thereof, and upon the death of the Trustor, the Trustee shall pay the entire net income, revenue and profit therefrom to Blanche M. Sternheim, sister of the Trustor, for and during her natural lifetime, and upon the death of said sister of the Trustor or upon the death of the Trustor, whichever event shall last occur, the trust shall cease and terminate, and all of the trust estate remaining in the possession of the Trustee shall vest in and go to the following organizations and institutions:

Shriners Hospital for Crippled Children, of
San Francisco,

Mount Zion Hospital, San Francisco,

Community Chest, of San Francisco,

in portions and amounts to be decided in the sole,

(Testimony of Frank J. Brickwedel.)

Petitioner's Exhibit No. 3—(Continued)

uncontrolled and absolute discretion of the Trustee, upon considering the then existing needs of the aforesaid organizations and institutions.

5.

11. The Trustee shall have the power in its uncontrolled discretion to use and apply such part of the principal of the trust estate held for any beneficiary as it may consider suitable or necessary in the interest and for the welfare of such beneficiary in the event of sickness, accident, want, or other emergency of or to any of the beneficiaries then receiving the income from the trust estate or from any portion thereof; provided that, except as otherwise herein provided, not more than ten per cent (10%) of the principal of the trust estate shall be used or applied in any one year for said purposes or any of them.

12. All income or principal to be paid to any of the beneficiaries named herein shall be paid by the Trustee direct and only to said beneficiaries. The Trustee is not to recognize any transfer, mortgage, pledge, hypothecation, order, or assignment of any beneficiary, with the exception of the Trustor, by way of anticipation of any part of the income or principal. The principal and income of the trust estate shall not be subject in any manner to transfer by operation of law unless otherwise herein provided, and shall be exempt from the claims of creditors or other claimants and from orders, de-

(Testimony of Frank J. Brickwedel.)

Petitioner's Exhibit No. 3—(Continued)

crees, levies, attachments, garnishments, and executions, and other legal or equitable process or proceedings to the fullest extent permissible by law.

13. The Trustor hereby agrees to indemnify the Trustee for and save it harmless from, and the Trustee at all times shall have a lien upon the entire trust property and income for its reimbursement for or the payment of all costs, damages, expenses, fees, judgments, taxes, assessments, and liabilities which it may incur or pay or be compelled to pay or for which it may become liable or answerable by reason of its acceptance of this trust

6.

or in connection with its holding title to or its management of the trust property, and particularly for all thereof due to injury to person or property by or upon or in connection with any real property which may be held hereunder, or which may pertain to any policy or stock or security held hereunder, and whether or not any legal action shall be commenced or any judgment obtained with respect thereto.

14. This agreement shall be controlled by the laws of the State of California, and for its ordinary services hereunder it is understood and agreed that the Trustee shall receive annually: five-sixteenths of one per cent ($5/16$ ths of 1%) of the fair value of the corpus of the trust fund, provided, however, that as to such part of the corpus of a value in

(Testimony of Frank J. Brickwedel.)

Petitioner's Exhibit No. 3—(Continued)

excess of fifty thousand dollars (\$50,000) the annual compensation of the Trustee in respect to such part of the corpus shall be one-quarter of one per cent ($1/4$ of 1%) of the fair value in excess of fifty thousand dollars (\$50,000); provided further that as to cash deposited and held in savings accounts the annual compensation of the Trustee shall be one-twentieth of one per cent ($1/20$ of 1%); provided further that no compensation shall become payable with respect to life insurance forming part of the trust estate unless and until collection shall be made of the proceeds thereof; provided further that, notwithstanding any of the foregoing provisions, such annual fee of the Trustee shall not be less than Twenty-five Dollars (\$25.00). If the trust shall in any manner otherwise than by revocation terminate in whole or in part, then upon such termination said Trustee shall be entitled to receive as additional compensation one per cent (1%) of the fair value of the property as to which the trust shall have been terminated. Should this trust be revoked in whole or in part, said Trustee shall be entitled to a reasonable fee for its services hereunder. In the event that it becomes necessary

7.

for the Trustee to perform extraordinary services hereunder or to engage legal services, said Trustee shall be allowed a reasonable fee for said extraordinary services and also a reasonable fee in addi-

(Testimony of Frank J. Brickwedel.)

Petitioner's Exhibit No. 3—(Continued)
tion for its counsel, payable, as it may deem proper, wholly or partly from the principal or income of the trust estate or from both.

In Witness Whereof, the parties hereto have executed these presents on the day and year first above written.

BEN F. STERNHEIM

Trustor

WELLS FARGO BANK &
UNION TRUST CO.,

Trustee,

By F. J. BRICKWEDEL

Vice-President

By R. J. SCHRADER

Trust Officer

Approved as to form for trustor:

HELLER, EHRMAN, WHITE
& McAULIFFE

By LOUIS HEILBRON

[Endorsed]: T.C.U.S. Filed Feb. 2, 1943.

8.

By Mr. Baker:

Q. Mr. Brickwedel, what is the present value of the assets in the trust created by Ben Sternheim during his lifetime?

A. The value as of January 18, 1943, was \$86,779.67.

(Testimony of Frank J. Brickwedel.)

Q. What is the gross income from that trust estate?

A. The gross income is \$2,686.25 annually.

Q. And what is the net income?

A. \$2,411.25. [46]

Q. May I see that list of assets you have there?

A. (Handing document to Mr. Baker): Yes.

Q. Mr. Brickwedel, I show you a document which purports to list the assets of the estate or of the trust created by Ben Bernheim. I will ask you if that document sets forth fully and correctly the assets now held or held on January 26, I should say, 1943, in that trust estate?

A. (Examining document): Yes, if we take into account the pencil notations at the foot with respect of the cash on hand.

Q. Yes, the pencil notations show the cash that is now on hand.

A. That is right.

Mr. Baker: Well, let the record show that this document which is about to be introduced in evidence or offered in evidence purports to set forth fully the assets of that trust created by Ben Sternheim as of January 26, 1943.

By Mr. Baker:

Q. Mr. Brickwedel, these assets as so shown on this document were the assets upon which that valuation which you just gave is based, is that correct?

A. That is right.

Mr. Baker: I will offer this in evidence as Petitioner's exhibit next in order. [47]

Mr. Horrow: No objection.

(Testimony of Frank J. Brickwedel.)

Judge Smith: The document will be marked Petitioner's Exhibit 4 and received.

By Mr. Baker:

Q. Now, Mr. Brickwedel, just so that the picture can be complete on that trust, the estate, as you have testified, consisted of life insurance, at the date of the death of the decedent it consisted of the proceeds of the life insurance plus the savings accounts.

Did you then proceed to invest the sums in securities?

A. Yes, sir.

Q. And as of today the exhibit just offered in evidence represents all those securities in which you have invested those sums?

A. Of course, some securities were sold during the course of the administration.

Q. Yes, and reinvested. Some were reinvested?

A. That is right.

Q. Mr. Brickwedel, to your knowledge, on June 25, 1929, did Blanche Sternheim, the sister of Ben F. Sternheim, create a trust naming her brother as trustee?

A. On July 25, 1939, such a trust was created.

[48]

Q. Now, is Wells Fargo Bank & Union Trust Co. now the substitute trustee of that trust?

A. It is, subject to a certain amendment that was made.

Q. Yes. Do you have the date of that amendment, Mr. Brickwedel?

(Testimony of Frank J. Brickwedel.)

A. Dated the 31st of July, 1940.

Q. Is that the amendment that you speak of (handing document to the witness)?

A. (Examining document): Yes, and there was an amendment also made on September 12, 1940.

Q. The amendment dated the 25th of July, 1940, entirely modified the terms of the trust, the original trust?

A. To a very large extent.

Q. Mr. Brickwedel, I show you a document which purports to be an amended trust agreement created by Blanche Sternheim in which Wells Fargo Bank & Union Trust Co. is the substitute trustee and ask you if that document is a full, true, and correct copy of the amended trust agreement of Blanche Sternheim?

A. (Examining document): That is so except as to signatures and except as to the trustee. Mr. Kahn was named as successor trustee.

Q. Mr. Kahn was the first successor trustee, was he? [49]

A. Yes.

Q. And then you succeeded Mr. Kahn, is that right?

A. Yes, sir.

Q. You are now acting as trustee pursuant to the terms and provisions of this amended trust agreement?

A. And subject to the terms of the subsequent amendment.

Mr. Baker: Yes. For the record I will state, your Honor, that the original agreement dated the 25th day of July 1929—and this has been discussed with Mr. Horrow—was entirely superseded by this

(Testimony of Frank J. Brickwedel.)

amended trust agreement which I am now about to offer in evidence, that subsequent to the 3rd day of July, 1940, and on the 12th day of September 1940 another amendatory agreement was executed which, however, has no bearing at all upon the issues here and would only complicate the record if we introduced it. It was amended in a very minor way.

I will offer this document in evidence as Petitioner's Exhibit next in order.

Mr. Horrow: No objection.

Judge Smith: It will be marked Petitioner's Exhibit 5 and received in evidence.

(Amended trust agreement referred to marked Petitioner's Exhibit No. 5 and received in evidence.)

PETITIONER'S EXHIBIT No. 5

AMENDED TRUST AGREEMENT

July

This Agreement, made this 31st day of ~~June~~, 1940, between Blanche M. Sternheim (a single woman), formerly known as Blanche Sternheim Altmayer, of the City and County of San Francisco, State of California, herein called the "Trus-tor", and Max Kahn, as trustee under the trust agreement of July 25, 1929, herein called the "Trustee".

Witnesseth:

That Whereas, on the 25th day of July, 1929, the Trustor entered into an agreement with Benjamin

(Testimony of Frank J. Brickwedel.)

Petitioner's Exhibit No. 5—(Continued)

F. Sternheim, her brother, therein called the trustee, wherein and whereby Trustor granted, transferred, and set over to her said brother all of her property with the exception therein stated, said trust property consisting entirely of personal property, to-wit, stocks, bonds, and cash, which had already been in his possession and commingled with his own property, to have and to hold the same as trustee upon the trusts therein specified during the natural life of the Trustor; and said trustee thereupon entered upon the performance of the duties of said trust and continued to hold possession of her said property and performed the duties of his trust, until the time of his death; and

Whereas, said Benjamin F. Sternheim died on the 9th day of April, 1940, and such proceedings were thereafter duly had and taken in the Superior Court of the State of California in and for the City and County of San Francisco, in the matter of his estate that the Wells Fargo Bank & Union Trust Company, of San Francisco, was appointed and is now acting as executor of his will; and

Whereas, said deceased trustee, as permitted by said trust agreement, thereafter continued to commingle the trust property with his own property, so that some or all of same stood, and still stands, in his name and cannot be distinguished from his own property, and so held the same until his death, and said property is now in the possession of said bank as executor of his will or as depositary of the trust funds as below set out; and

(Testimony of Frank J. Brickwedel.)

Petitioner's Exhibit No. 5—(Continued)

Whereas, after the death of said Benjamin F. Sternheim, such proceedings were duly and regularly had and taken in the said Superior Court in the matter of the application of Blanche M. Sternheim, formerly known as Blanche Sternheim Alt-mayer, for appointment of a trustee to fill the vacancy caused by the death of said trustee, and for the appointment of a depositary of the property of the estate, said proceeding being numbered 249,942 in the civil files of said court, that on the 9th day of May, 1940, the above-named Max Kahn was appointed trustee of said trust to fill said vacancy, and thereafter duly qualified as such trustee, and thereupon became and has since continued to be and now is the duly appointed, qualified, and acting trustee of said trust, and said bank became and now is the depositary of the property of said trust estate; and

Whereas, Trustor in said trust agreement of July 25, 1929, reserved to herself the right to modify or alter the same with the agreement of the Trustee, and is desirous of modifying and altering said trust agreement in the particulars hereinafter set forth and the trustee has consented to said modifications and alterations;

1.

Now, Therefore, in consideration of the premises it is agreed that said trust agreement be and the same hereby is modified, altered, and amended so as to read as follows:

The Trustor hereby grants, transfers, and sets

(Testimony of Frank J. Brickwedel.)

Petitioner's Exhibit No. 5—(Continued)
over to said Trustee all of her property, consisting of stocks, bonds, and cash, said property being, as hereinbefore set forth, in the possession of the Wells Fargo Bank & Union Trust Co., of San Francisco, California, as executor of the will of Benjamin F. Sternheim, deceased, or as depositary appointed by the court of the property of the trust.

To have and to hold the same unto the said Trustee, nevertheless, for the following uses and purposes:

(1) The Trustee shall have full power and authority (a) to hold and retain in its discretion any of the property coming into its possession hereunder in the same form of investment as that in which it is received by it (except that any moneys received by it hereunder to become part of a trust fund shall be forthwith invested in accordance with the terms hereof); (b) to exercise any right or option of subscription or otherwise which may at any time attach, belong, or be given to the holders of any stocks, bonds, securities, or other instruments in the nature thereof forming part of the trust estate, and to join in any plan of lease, mortgage, consolidation, reorganization, or foreclosure of any corporation, trust, or organization, or the property or assets thereof, including the deposit of bonds, securities, and stock with any bondholders', stockholders', or protective committee in which the trust estate may hold stocks or bonds or other securities, and to take and hold any securities issued

(Testimony of Frank J. Brickwedel.)

Petitioner's Exhibit No. 5—(Continued)

under such plan and to pay any assessments thereunder; (c) to enforce any mortgage or deed of trust or pledge held hereunder and to purchase at any sale thereunder any property subject thereto; (d) to sell at public or private sale (for cash or on terms), improve, lease (without restriction or limit as to term), mortgage, convey in trust, pledge, hypothecate, transfer, exchange, compromise, surrender, or otherwise deal with the whole or any part of the trust property upon such terms and conditions as said Trustee in its discretion may deem advisable; (e) to hold any securities in bearer form or in the name of the trustee or of any nominee of the Trustee, and to exercise any of the foregoing powers through such nominee; (f) to invest and reinvest any of the trust property held hereunder in such amounts and in such property, real or personal, as the Trustee shall deem fit and proper, without being restricted to investments prescribed or authorized by law as trustees' investments.

Provided, however, that notwithstanding the powers herein given the Trustee in respect to the investment and reinvestment of trust funds and property, the Trustor reserves the right to employ Loomis, Sayles & Co., Inc. or other investment counsel to direct the investment and reinvestment of the funds and property of the trust. Until such employment the Trustee shall possess all of the powers herein given it; but upon such employment, Trustor shall and will at once notify the Trustee

(Testimony of Frank J. Brickwedel.)

Petitioner's Exhibit No. 5—(Continued)

thereof in writing, and thereafter and for the duration of such employment the powers of the Trustee in respect to such investment and reinvestment shall be suspended and the Trustee shall be governed by the advice of such investment counsel in all matters pertaining to their employment, and shall during such employment be relieved of all investment responsibility while acting in accordance with the

2.

advice of such counsel, and the Trustee shall comply with all of the directions of said Loomis, Sayles & Co., Inc. or such other investment counsel as may be employed by Trustor with respect to the investment and reinvestment of the trust estate irrespective of whether such directions may contemplate investment in hazardous, speculative or non-income bearing securities or property, and irrespective of whether the trustee shall deem the same prudent or whether the same shall be prudent under any standard of conduct applicable to trustees, and the trustee shall not be liable, accountable or responsible to any one whomsoever for so complying with such directions of said Loomis, Sayles & Co., Inc., or such other investment counsel.

(2) To pay to the Trustor monthly out of such trust property in the hands of the Trustee during the life of the trust thus created, the net issues, dividends, profits and income of the trust funds, forwarding the same to such address as is given in writing by the Trustor to the Trustee, or to deposit the same for the account of the Trustor in such

(Testimony of Frank J. Brickwedel.)

Petitioner's Exhibit No. 5—(Continued)

bank in the City and County of San Francisco as may be hereafter named in writing by the Trustee.

In case said net income payable to the Trustor shall in any calendar month after the date of this amended agreement be less than \$600.00, the Trustee shall, upon receipt of the written request of the Trustor, withdraw from the corpus of the trust property and pay to the Trustor a sufficient sum to make up the deficiency.

The Trustee shall, in addition to said \$600.00 a month, pay to the Trustor, upon receipt of her written request therefor, either at one time or from time to time, from the corpus of the trust property such sum or sums as Trustor shall demand, but not exceeding in any one calendar year 10% of the trust estate then in the hands of the Trustee or depositary.

In addition to the foregoing amounts, the Trustee shall have the power in trustee's uncontrolled discretion to use and apply such part of the principal of the trust estate held for Trustor as Trustee may consider suitable or necessary in the interest and for the welfare of Trustor in the event of sickness, accident, want, or other emergency of or to Trustor.

It is recognized that during the encumbency of the deceased Trustee, Trustor has received from the trust estate less than the net income of the trust estate therein provided to be paid to her, and it is provided that such unpaid net income shall be

(Testimony of Frank J. Brickwedel.)

Petitioner's Exhibit No. 5—(Continued)

added to and become a part of the principal of the trust, but only after withdrawing and paying to the Trustor absolutely therefrom the sum of \$

(3) The trust funds or property herein referred to or described shall be freely subject to disposition by the Trustor under the terms of her last will and testament executed by the Trustor in accordance with the laws of the State of California.

(4) The Trustee shall immediately take, and he is hereby given full and complete power and authority to take, such steps, by partition or otherwise, as may in his judgment be necessary to separate and segregate the property of the trust from that owned by the estate of said deceased trustee,

3.

and the same shall thereafter be held and kept separate and apart therefrom.

(5) The Trustor may add to such trust property and such trust funds from time to time and such additions shall be invested and disposed of according to the provisions of this agreement.

(6) All income or principal to be paid to any of the beneficiaries named herein shall be paid by the Trustee direct and only to said beneficiaries. The Trustee is not to recognize any transfer, mortgage, pledge, hypothecation, order, or assignment of any beneficiary, by way of anticipation of any part of the income or principal. The principal and income of the trust estate shall not be subject in any manner to transfer by operation of law unless otherwise herein provided, and shall be exempt from the

(Testimony of Frank J. Brickwedel.)

Petitioner's Exhibit No. 5—(Continued)

claims of creditors or other claimants and from orders, decrees, levies, attachments, garnishments, and executions, and other legal or equitable process or proceedings to the fullest extent permissible by law.

(7) The Trustee may resign and discharge himself of the trusts created hereunder during the lifetime of the Trustor, but such resignation shall not become effective until thirty (30) days written notice is given to the Trustor by the Trustee. Such discharge shall not release the Trustee from liability for any acts of misconduct or negligence by him in the management of the trust.

In the event that the Trustee shall at any time be unable or unwilling to continue to act as such, or shall resign, the Trustor hereby nominates the Wells Fargo Bank & Union Trust Company, of San Francisco, to act as such trustee in his place and stead, and in case said bank shall be unable or unwilling to act as such Trustee, she reserves the right to designate and appoint any bank to act as such trustee, and in any such case, upon the notification of such bank in writing of her appointment of it as trustee and the acceptance in writing of the appointment by such bank, such bank shall thereupon become trustee of the said trusts and entitled to receive the property of the trust and hold it under said trust agreement of July 25, 1929, as amended hereby.

(8) The Trustor hereby agrees to indemnify the

(Testimony of Frank J. Brickwedel.)

Petitioner's Exhibit No. 5—(Continued)

Trustee for and save it harmless from, and the Trustee at all times shall have a lien upon the entire trust property and income for its reimbursement for or the payment of all costs, damages, expenses, fees, judgments, taxes, assessments, and liabilities which it may incur or pay or be compelled to pay or for which it may become liable or answerable by reason of its acceptance of this trust or the connection with its holding title to or its management of the trust property, and particularly for all thereof due to injury to person or property by or upon or in connection with any real property which may be held hereunder, or which may pertain to any policy or stock or security held hereunder, and whether or not any legal action shall be commenced or any judgment obtained with respect thereto.

(9) The Trustee shall amortize any premium paid in the purchase of bonds for the trust estate by setting aside so much of the income from each such bond purchased at a premium as shall be reasonably necessary to prevent diminution of the principal of the trust estate upon the redemption or payment of such bond. All stock dividends (other than

4.

those expressly stated by the declaring corporation to be out of current earnings) and amounts received upon the sale of Rights to subscribe for stocks, or any profit accruing from the exercise of such Rights shall be credited to principal and added to the trust estate and be held as a part thereof.

(10) Upon the death of the Trustor, intestate,

(Testimony of Frank J. Brickwedel.)

Petitioner's Exhibit No. 5—(Continued)

or if any will left by her shall be or be adjudged invalid, the Trustee shall pay and distribute the trust estate in trustee's hands with approximate equality to ten worthy charities, to be selected by the trustee in his uncontrolled discretion without regard to religious character, but with particular regard to need and worthiness, eliminating so far as may be found feasible, in the interest of avoiding duplication, the charities provided for in the will of Trustor's brother, Benjamin F. Sternheim.

(11) This agreement shall be controlled by the laws of the State of California; and if and when said Wells Fargo Bank & Union Trust Company, or any other bank shall act as Trustee hereunder, such bank, for its ordinary services hereunder as such Trustee shall receive annually; five-sixteenths of one per cent ($5/16$ th of 1%) of the fair value of the corpus of the trust fund, provided, however, that as to such part of the corpus of a value in excess of Fifty Thousand Dollars (\$50,000.00) the annual compensation of the Trustee in respect to such part of the corpus shall be one-quarter of one per cent ($1/4$ of 1%) of the fair value in excess of Fifty Thousand Dollars (\$50,000.00); provided, further, that as to cash deposited and held in savings accounts the annual compensation of the Trustee shall be one-twentieth of one per cent ($1/20$ of 1%); provided, further, that notwithstanding any of the foregoing provisions such annual fee of the Bank Trustee shall not be less than

(Testimony of Frank J. Brickwedel.)

Petitioner's Exhibit No. 5—(Continued)

\$25.00. Upon the termination of this trust, in whole or in part, said bank Trustee shall be entitled to receive as additional compensation one per cent (1%) of the fair value of the property as to which the Trust shall have been terminated. In the event that it becomes necessary for the Bank Trustee to perform extraordinary services hereunder or to engage legal services, said Bank Trustee shall be allowed a reasonable fee for said extraordinary services and also a reasonable fee in addition for its counsel, payable, as it may deem proper, wholly or partly from the principal or income of the trust estate or from both.

(12) The Trustor reserves to herself the right to modify or alter this trust upon thirty (30) days written notice first given to the Trustee, but no modification or alteration hereof shall be valid unless agreed to in writing by the Trustor and the Trustee.

(13) This trust agreement is to remain in force and effect during the life of the Trustor, and shall be irrevocable.

In Witness Whereof, the parties have herewith set their hands the day and year first above written.

Executed in Triplicate.

Trustor

Trustee

5.

[Endorsed]: T.C.U.S. Filed Feb. 2, 1943.

(Testimony of Frank J. Brickwedel.)

By Mr. Baker:

Q. Mr. Brickwedel, how much income is Blanche Sternheim entitled to receive per month pursuant to the terms and provisions of the trust agreement, the trust created by her?

A. Well, by the terms of the instrument dated July 31, 1940, she is entitled to receive \$600 per month.

Q. How was that payable, out of what fund is that payable?

A. Payable first out of income and if income should not be sufficient then resort could be had to the corpus of the trust.

Q. Is she entitled to any other payments from this agreement?

A. Yes, additional, upon receipt of written request therefor the trustee would be required to pay her additional sums but not exceeding in any one calendar year ten per cent of the trust estate.

Q. Is she entitled to anything further in the discretion of the trustee?

Mr. Horrow: I take it the witness is reading provisions from the trust agreement which is in evidence?

Mr. Baker: Yes, Mr. Horrow.

Mr. Horrow: I am making no objection because I assume that the agreement will speak for itself.

Mr. Baker: Yes, it is the best evidence. I thought it might be a good idea simply to get it before his [51] Honor at this time, that is all. I admit it is irregular.

(Testimony of Frank J. Brickwedel.)

A. Yes, sir. "In addition to the foregoing amounts the trustee shall have the power in the trustee's uncontrolled discretion to use and apply such part of the principal of the trust estate held for the trustor as the trustee may consider suitable or necessary in the interest and for the welfare of trustor in the event of sickness, accident, want, or other emergency of or to trustor."

By Mr. Baker:

Q. Mr. Brickwedel, what is the present value of the assets of this trust created by Ben Sternheim?

A. The value of January 18th was \$138,745.20.

Q. What is the annual gross income from this trust? A. \$7,803.55.

Q. What is the annual net income?

A. Approximately \$7,303.55.

Q. I show you a document, Mr. Brickwedel, which purports to set forth the assets now held by the bank as trustee of the Blanche Sternheim trust and ask you if that sets forth fully and correctly the assets now held by the trustee in that trust.

A. (Examining document) As of January 18, 1943, it does.

Q. As of January 18, 1943. The valuation of the assets in this estate which you gave a few minutes ago is [52] based upon the assets as set forth in this document, is that correct?

A. It is.

(Testimony of Frank J. Brickwedel.)

Mr. Baker: Yes. I will offer in evidence the document purporting to set forth a list of the assets in the Blanche Sternheim trust as Petitioner's Exhibit next in order.

Mr. Horrow: No objection.

Judge Smith: It will be marked Petitioner's Exhibit 6 and received.

Judge Smith: I think we might have a five-minute recess at this time.

Mr. Baker: Yes, your Honor.

(A short recess was taken.)

By Mr. Baker:

Q. Mr. Brickwedel, do your records show the ages of Blanche Sternheim, Helen Opet, Lena Kohlman, Carrie Blattner, and Julius Fleischer?

A. They do.

Q. And what was the source of your information with regard to their ages?

A. The source of our information was a letter relating to the last will of Ben F. Sternheim which he addressed [53] to our bank.

Q. And what does he show to be the ages of these beneficiaries?

A. Well, an excerpt from his letter is as follows:

"The ages at present, 1938, of the beneficiaries in my will are as follows: My sister, Blanche M. Sternheim, is 58; Cousin Carrie Blattner, is 71; Cousin Julius Fleischer, is 69; Cousin Lena Kohlman, is 72; and my lifelong friend, Helen M. Opet is 59."

(Testimony of Frank J. Brickwedel.)

Q. And that was as of June 1938?

A. That is right.

Mr. Baker: Your Honor, we only have the exact birthdays of two of these beneficiaries which I have ascertained and Blanche Sternheim, of course, is not a beneficiary of the estate proper; she is only a beneficiary of the revocable trust. The date of her birth was April 24, 1880. Miss Opet, who is the only present resident of San Francisco among the beneficiaries of the estate proper, was born on December 22, 1879. As to the others, we just have to rely upon the date or the birth of their ages as given by the decedent in 1938.

Mr. Horrow, for the purpose of the record and, of course, subject to your objection, if you wish to make it, or to your legal argument later, I wish to introduce the [54] figures in connection with a matter I stated in my opening statement, that is, the amount which was actually charged to the living trust on account of these income taxes which were paid after the death of the decedent.

Mr. Horrow: Yes. We can stipulate, I believe, as to the amount paid.

Mr. Baker: From the living trust.

Mr. Horrow: Yes, from the living trust. Also, I think we can stipulate that those amounts were \$5,408.15 covering the principal amount of income tax and interest accrued up to the death of Ben F. Sternheim in the amount of \$3,591.01 making a total of \$8,999.16.

Mr. Baker: So stipulated.

(Testimony of Frank J. Brickwedel.)

Mr. Horrow: And will it be stipulated that that amount was paid out of the corpus of the trust?

Mr. Baker: So stipulated.

And then will it be stipulated, Mr. Horrow, that in effecting the settlement for contribution purposes between Blanche Sternheim and the Estate of Ben Sternheim that the estate paid an additional \$2,000 over and above the two-third-one-third ratio, in other words, the two-thirds-one-third ratio was not exactly accurate; the bank paid \$2,000 more?

Mr. Horrow: Yes, I think we should stipulate that the Sternheim Company, whose tax was in controversy [55] after the death of Ben F. Sternheim, deceased, was owned one-third by Blanche Sternheim and two-thirds by the decedent at the time of its liquidation, further, that the amounts which we have stipulated as additional allowance in respect to the income tax liability of the corporation represented two-thirds of the liability, and that in addition to that amount the estate paid \$2,000 which was applied against the income tax liability of the corporation.

Mr. Baker: And which came out of the corpus of the estate?

Mr. Horrow: Yes, came out of the residue of the estate of Ben F. Sternheim.

Mr. Baker: Yes. It is those two amounts, your Honor, with respect to which we are in disagreement as to whether they can be allowed to reduce the value of the estate for estate tax purposes.

(Testimony of Frank J. Brickwedel.)

Mr. Horrow: Yes, we have stipulated to that.

Mr. Baker: Yes, so stipulated.

By Mr. Baker:

Q. Mr. Brickwedel, referring to the clause in the will of Ben Sternheim—I don't know what number that is. I think it is one.

The Clerk: One.

By Mr. Baker:

Q. Yes, the copy of which is Exhibit 1 of the [56] petitioner in evidence. Referring, as I stated, to the clause which has given rise to the major issue in this controversy which provides that the amount which the trustee may pay from the principal of the trust estate in the event of sickness, accident, want or other emergency shall be limited to ten per cent of the portion of the principal of the trust held for any beneficiary, would you please state to the court what value you, as the bank, Wells Fargo Bank & Union Trust Co. as trustees uses in any one year when making such payments in order to estimate the ten per cent to which any beneficiary would be entitled?

A. In operating under a provision in that form we would ascertain the value of the corpus as of the date on which a request was made of us for principal funds and we would add to that total value the amount of any principal payments we had previously made subsequent, however, to the last anniversary of the trust, and it would be that total sum of which we would ascertain ten per cent as the maximum that we could allow.

(Testimony of Frank J. Brickwedel.)

Q. If I may be permitted the irregularity of a hypothetical case, assume that the assets of this trust were worth \$100,000 at the date that it was set up, and assume that in the first year the beneficiary of that trust requested his full ten per cent or \$10,000, assume, so that the situation will be clear, that no fluctuation in value in [57] those assets occurs so that at the beginning of the next calendar year, the next anniversary of the trust and anniversary year the value of the estate was \$90,000, assume that the beneficiary made a request for the full amount to which he is entitled, what valuation would you use to ascertain the ten per cent to which he is entitled?

A. We would ascertain the value of the fund as of the date on which the request was made on us for moneys.

Q. Which in a hypothetical case would be——

A. Assuming no fluctuation it would be \$90,000.

Mr. Baker: Yes. That is all.

Judge Smith: Mr. Horrow?

Cross Examination [58]

Q. Now, referring to the inter vivos trust created by the decedent, the statement was made that some amount of approximately \$9,000 was paid out of that trust in partial satisfaction of the income tax liability of Sternheim Company.

You were familiar with that, Mr. Brickwedel?

A. Yes, sir.

Q. Under what authority was that payment made?

(Testimony of Frank J. Brickwedel.)

A. Well, we sought the advice of our counsel who told us that we had the power to compromise and that in the exercise of our power to compromise it would be proper for us to make that treatment of that amount in the settlement of the tax.

Q. Has any other payment been made out of the corpus of the trust up to the present time?

A. Yes. During the pendency of this tax controversy there were some payments made to Blanche Sternheim out of the corpus of that trust.

Q. Can you state the amount of those payments?

A. No, I don't have the detail here.

Mr. Baker: I have it in general, Mr. Horrow. In the first place there were some payments made even prior [59] to that time. I am testifying in a way but if you don't mind that I happen to know the facts on it.

Mr. Horrow: So far I have accepted all your statements, Mr. Baker.

Mr. Baker: In 1940 when Ben Sternheim died he was the trustee of the trust created by Blanche Sternheim. With the acquiescence of Miss Sternheim he had kept all of the assets of that trust commingled with his own. The result was that at the date of the death of Ben Sternheim it became necessary to disentangle the amounts which belonged to Blanche and the amounts which belonged to the Estate of Ben. Some difficulty was entailed in doing that, in agreeing who owned what. Finally an agreement was reached and the trust was set up for Blanche Sternheim under the docu-

(Testimony of Frank J. Brickwedel.)

ment which we have introduced in evidence. But during that time Blanche was in need of funds so that the sum of \$500 per month was paid to her under the emergency clause, as we call it, in the living trust created by Ben, \$500 per month for three months under an agreement with Blanche Sternheim that she would repay that sum, which she did.

Mr. Horrow: I will stipulate to that statement, your Honor.

Could you state, Mr. Baker, just when the \$500 per month was paid out of the corpus of the inter vivos trust? [60]

Mr. Baker: You mean those three that I was telling you about?

Mr. Horrow: Yes, the \$1500 you referred to.

Mr. Baker: It was paid shortly after the 9th day of April, 1940, the date of the death of Ben Sternheim, I should judge approximately in the months of May and June and July of that year. I can put Mr. Hack on the stand. Mr. Hack, I believe, has that information.

Mr. Horrow: Yes.

Well, I think I can stipulate to the statements made by counsel, your Honor. That is my understanding.

Mr. Baker: I am not certain that those months are exactly correct.

Mr. Horrow: At any rate, it was shortly after the date of death of decedent?

Mr. Baker: That is correct, under an agree-

(Testimony of Frank J. Brickwedel.)

ment that she would repay those amounts, which she did.

Mr. Horrow: Will you further stipulate that the payments were made under paragraph 11 of Petitioner's Exhibit 3?

Mr. Baker: Correct.

Mr. Horrow: That is under the so-called emergency clause which you referred to?

Mr. Baker: Yes. Then, as we have stated before, these income tax claims which were pressed by the government [61] likewise were pressed against this trust created by Blanche Sternheim with the result that the bank, as trustee, knowing that if we had to go to court on the thing and if the government had succeeded in pressing its claim to the utmost the liability would have been in excess of \$500,000 with the result that the Estate of Ben Sternheim would have been wiped out and with the result that the government would have had to have looked to that trust, which they were looking to anyway, and possibly eaten that up too. The bank froze those payments, and further payments to Blanche Sternheim under that trust.

Mr. Horrow: I will stipulate to that except I think it should be qualified, your Honor, by the statement that the Commissioner of Internal Revenue never made any determination of liability against the inter-vivos trust created for Blanche Sternheim.

Judge Smith: Created by her, you mean. Are

(Testimony of Frank J. Brickwedel.)

you talking about the trust created by Ben or the one created by Blanche?

Mr. Horrow: I am talking about the one created by Ben for Blanche.

Judge Smith: Yes.

Mr. Horrow: No deficiency notice was given to the trustee of that trust although deficiency notices were mailed asserting liability against the Estate of Ben F. [62] Sternheim, the trust created by Ben F. Sternheim or, rather, the trust created by Blanche Sternheim.

Isn't that correct, Mr. Baker?

Mr. Baker: You did send a deficiency notice to the trustee of the trust created by Blanche but did not do so as to the trustee of the trust created by Ben.

Mr. Horrow: That is correct; that is right.

Mr. Baker: Yes.

Mr. Horrow: There was never any formal determination of liability against the inter-vivos trust.

Mr. Baker: Then, since there was an assertion of liability against the trust created by Blanche all of her assets were in that trust. It is a trust amendable by her, as your Honor will see by looking at the document in evidence, but purports to be otherwise irrevocable although I am not so sure under the law that power to amend wouldn't give her the power to amend the provision to revoke. Anyway, that is a question. In any event, since the liability, since there was danger that even that trust created by Blanche against which the govern-

(Testimony of Frank J. Brickwedel.)

ment was asserting liability might be reached, the bank felt compelled to freeze all further payments out of that trust to Blanche, with the result that at that time we had no intimation that the government was even formally or informally making any claims against the Ben Sternheim inter-vivos trust and an agreement was [63] reached in order to supply Miss Sternheim with monthly payments to pay her, until the storm should subside, pursuant to the emergency clause in the Ben Sternheim trust the sum of \$500 a month which was done for some seven or eight months. I don't know the exact number of months. Mr. Hack I think can tell me.

Mr. Hack: I think \$325 from the principal of the trust, \$3600 in all.

Mr. Baker: In all we paid \$325 from the principal of that trust, Mr. Hack tells me, Wells Fargo Bank & Union Trust Co., and the total paid from principal was some \$3300.

Mr. Hack: Approximately \$3700.

Mr. Baker: Approximately \$3700 until such time as the income tax claim was settled.

Mr. Horrow: Well, now, just to get the record clear will you stipulate in respect to the matters that you referred to?

Mr. Baker: Yes, I will so stipulate.

Mr. Horrow: I don't like to stipulate, your Honor, that the respondent ever made any claim against the inter-vivos trust. However the trustee or the parties involved may have felt about the matter the government never made any claim

(Testimony of Frank J. Brickwedel.)

against the inter-vivos trust although an amount was paid out of the corpus of that trust in [64] satisfaction of the liability that was in controversy at that time.

Mr. Baker: Except, Mr. Horrow, I definitely recall that in conferences had with you and other members of the technical staff there were statements to that effect, looking toward that inter-vivos trust. Now perhaps you don't recall that and will not want to stipulate to that fact, but I do recall that some statements were made with regard to the inter-vivos trust and its potential liability.

Mr. Horrow: I don't recall any assertion of any liability.

Mr. Baker: Well, I wouldn't ask you to stipulate to that if you don't. However, we did feel definitely the government would have looked toward that trust to satisfy its claim, if necessary, and that occasioned our subsequent conduct.

By Mr. Horrow:

Q. Now, Mr. Brickwedel, referring again to the inter-vivos trust, you stated that the gross income was approximately \$2500, is that correct?

A. I don't think that was the figure.

Mr. Baker: Do you mean the Ben Sternheim inter-vivos trust?

Mr. Horrow: I am referring to the inter-vivos trust created by Ben Sternheim. [65]

By Mr. Horrow:

Q. What was the annual gross income which you testified to?

(Testimony of Frank J. Brickwedel.)

Mr. Baker: I don't know whether Mr. Brickwedel has those figures with him.

A. No, I don't have them.

Mr. Baker: They may be in these documents in evidence.

Let the record show that I am handing Mr. Brickwedel Petitioner's Exhibit No. 4 in evidence.

The Witness (Examining document): It showed a gross income of \$2686.25 annually.

By Mr. Horrow:

Q. Was that an estimated sum or a sum actually received by the trust?

A. Well, that was the income that we anticipate will be received assuming that these assets are retained and that there is no default.

Q. In other words, it is simply an estimated amount of income? A. Yes, sir.

Q. Now, what has the income of the trust been since its inception, the income for each year? Do you have those figures?

A. I don't have those figures. [66]

Mr. Horrow: Do you have them?

Mr. Baker: I don't have them, Mr. Horrow.

Mr. Hack: Approximately \$2100 a year net.

Mr. Baker: I find from Mr. Hack of the bank, who is in direct touch with this, that it has been \$2100 a year net.

Mr. Horrow: Since the date of death?

Mr. Baker: Since the date of death, yes, sir.

Mr. Horrow: We will stipulate that the net income actually received by the trust since the date of death has been approximately \$2100 per year.

(Testimony of Frank J. Brickwedel.)

By Mr. Horrow:

Q. Now, as a matter of fact, Mr. Brickwedel, the corpus of the trust today is less than the corpus of the trust as it existed at the date of death?

A. (Affirmative nod.)

Mr. Baker: Your answer is "Yes," Mr. Brickwedel?

The Witness: Yes.

By Mr. Horrow:

Q. And the difference is approximately \$10,000, is that correct? A. A little more than \$7,000.

Mr. Horrow: Well, I think that arises over the difference as to the amounts in the trust as of the date of death, and I would like to offer in evidence the estate tax [67] return filed for the estate of Ben F. Sternheim as Respondent's exhibit.

Mr. Baker: No objection.

Mr. Horrow: It shows the amounts in the trust at the date of death, your Honor.

Judge Smith: It may be marked Exhibit A and received in evidence.

(Estate tax return referred to marked Respondent's Exhibit A and received in evidence.)

Mr. Horrow: That is all I have, your Honor.

Mr. Baker: I have no further questions.

(Witness excused.)

Mr. Baker: I will call Miss Blanche Sternheim.

Whereupon,

BLANCHE M. STERNHEIM

was called as a witness for and on behalf of the Petitioner, and having been first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Baker:

Q. Miss Sternheim, your full name is Blanche M. Sternheim, is it? A. Correct.

Q. And where do you reside, Miss Sternheim?

A. Hotel Californian. [68]

Q. What is your occupation?

A. Nothing. Well, I am not engaged in any work especially.

Q. What relation are you to the decedent, Ben F. Sternheim? A. A sister.

Q. You are the Blanche Sternheim who has been referred to continually throughout this proceeding? A. Yes, sir.

Q. Miss Sternheim, you are receiving income from two trusts in which Wells Fargo & Union Trust Co. is the trustee, are you not?

A. Well, I am now but I was not for a while.

Q. Yes, but you are now?

A. Well, only the last month or two.

Q. Since December? A. Yes, sir.

Q. Yes. And you did receive income from the trust which you created after the death of Mr. Sternheim in 1940? A. Yes.

Q. After there was a segregation of the assets?

A. Yes, sir.

(Testimony of Blanche M. Sternheim.)

Q. Up until approximately the first of the year 1942?

A. That is right. [69]

Q. Is that correct?

A. Yes, sir.

Q. At which time the income from the trust you created was shut off, is that correct?

A. Yes, sir.

Q. Now, out of the payments of income which you received from both of these trusts, which you have received, did you spend all of your income for your living expenses?

A. No, I did not.

Q. How much would you say on the average you have saved out of the income received per month?

A. Well, it approximately went from about \$250 to \$300 a month.

Q. And could you give an approximate estimate of what your average monthly living expenses are?

A. Well, at certain seasons of the year it is more than at others, but it is rather hard to tell always; it just depends. Do you mean just approximately?

Q. On the average, yes.

A. Well, if you don't buy anything and if you just pay your shelter and meals and things like that it would average, I would say, about \$300, if you don't buy anything.

Q. And sometimes it comes to more than that, naturally?

A. Well, naturally. That doesn't include any [70] professional services of any kind.

Q. And from your present knowledge of your wants and your needs, considering the income which you have received from this trust, would you be

(Testimony of Blanche M. Sternheim.)

able to estimate approximately how much in the future out of this income you would save, if any?

A. Well, providing there are no accidents or sickness or things like that, why, I could save about the same as I have been.

Q. That was between \$250 and \$300 a month?

A. Yes; sir.

Q. I see. And what is the state of your health, Miss Sternheim?

A. Well, it is very good outside of all this mental worry.

Mr. Baker: That is all.

Cross Examination

By Mr. Horrow:

Q. Miss Sternheim, immediately following the death of your brother did you make demands on the trustee of the bank for payments out of the——

A. No, I did not.

Q. Reference has been made to a sum of \$500 which was paid to you for three months following the death of your brother. Do you recall the circumstances of that? [71]

A. Well, that was an emergency when everything was tied up and my assets were involved in his until things were straightened out. I had no source of income other than that.

Q. How did you arrive at the amount of \$500?

A. Well, I am paying a certain amount at the hotel I live at, and my meals and things like that, and I am very economical, I am not throwing anything away at all.

(Testimony of Blanche M. Sternheim.)

Q. So then you consider that \$500 a month was exactly what you needed at the time those payments were made, isn't that correct?

A. Well, I probably save something out of it. It naturally would change according to what you would spend over an above your living and your shelter.

Q. But at any rate at the time you made a request for the payment of \$500 following the death of your brother you felt that you needed that much money for your care and your living expenses?

A. Well, at that time, yes.

Q. Now, at the time of the death of your brother were you receiving any medical care?

A. No, I was not.

Q. Are you at the present time?

A. I don't have doctors at all.

Q. You are very fortunate in that respect.

A. I am my own doctor. [72]

Q. Now, you are familiar with the terms of the trust which your brother created?

A. Yes, I am.

Q. You are familiar with the provisions relating to sickness or other emergencies?

A. Yes, yes.

Q. In the event any sickness or accident occurs is it your intention to demand that the trustee pay any sums that you consider necessary out of the profits of the trust?

A. I hope it won't be necessary. I hope I will stay well.

Q. Well, we hope so too, Miss Sternheim, but in

(Testimony of Blanche M. Sternheim.)

the event it becomes necessary is it your intention to make such request in accordance——

A. (Interposing): I think that is hard to say. If you should have an automobile accident or have to go to the hospital, I think those things are unforeseen. I hope I won't need anything like that.

Q. You would make such request, then, is that your answer?

A. I don't know. If I had enough income without it I suppose I wouldn't demand it.

Q. You hope that you won't demand it. But in the event it became necessary it is your intention to request [73] that sums be paid by the trustees?

A. Well, I wouldn't—— I couldn't say that because I am hoping that nothing will happen.

Mr. Horrow: Well, I think your Honor knows the situation.

Mr. Baker: Well, I don't think she has said that she would intend to do it. She said that if the income was sufficient she wouldn't do it.

The Witness: As far as I am going now I don't intend to draw on the principal unless it is very absolutely necessary.

Mr. Horrow: Is her age a matter of record?

Mr. Baker: Yes, it is a matter of record.

By Mr. Horrow:

Q. Do you have any dependents, Miss Sternheim?

A. No, I have none at all.

Mr. Horrow: That is all, your Honor.

[Endorsed]: T.C.U.S Filed Feb. 24, 1943. [74]

In the United States Circuit Court of
Appeals for the Ninth Circuit

Docket No. 111776

ESTATE OF BEN F. STERNHEIM, Deceased,
WELLS FARGO BANK & UNION TRUST
CO., Executor,

Petitioner on Review,

v.

COMMISSIONER OF INTERNAL REVENUE,
Respondent on Review,

STATEMENT OF POINTS

Comes now Estate of Ben F. Sternheim, deceased, Wells Fargo Bank & Union Trust Co., Executor, the petitioner on review herein, by and through its attorneys F. M. McAuliffe and L. C. Baker, and hereby asserts the following errors on which it intends to rely in this review:

1. The Tax Court erred in holding and deciding that the estate is not entitled to a deduction from the decedent's gross estate in the amount of the full value of the remainder interest in charitable institutions created by the revocable inter vivos trust agreement.

2. The Tax Court erred in not holding and deciding that the estate is entitled to a deduction from the decedent's gross estate in the amount of the full value of the remainder interest in charitable institutions created by the revocable inter vivos trust agreement. [96]

3. The Tax Court erred in holding and deciding that the fact that payments were made from the corpus to the life tenant of the revocable inter vivos trust subsequent to the date of the death of the decedent, as the result of events which occurred subsequent to the date of the death of the decedent, disentitled the estate to a deduction from the decedent's gross estate in the amount of the full value of the remainder interest in charitable institutions created by the revocable inter vivos trust agreement.

4. The Tax Court erred in not holding and deciding that the fact that payments were made from the corpus to the life tenant of the revocable inter vivos trust subsequent to the date of the death of the decedent, as the result of events which occurred subsequent to the date of the death of the decedent, did not disentitle the estate to a deduction from the decedent's gross estate in the amount of the full value of the remainder interest in charitable institutions created by the revocable inter vivos trust agreement.

5. The Tax Court erred in entering its order of redetermination that there is a deficiency in the estate tax in the amount of \$16,450.04.

F. M. McAULIFFE,

L. C. Baker,

Counsel for Petitioner on
Review.

Service of the within statement of points is hereby admitted this 30th day of November, 1943.

J. P. WENCHEL, (C. A. R.)

Chief Counsel, Bureau of Internal Revenue,
Attorney for Respondent on Review.

[Endorsed]: T.C.U.S. Filed Dec. 14, 1943. (97)]

[Title of Circuit Court of Appeals and Cause]

DESIGNATION FOR RECORD ON REVIEW

To the Clerk of the Tax Court of the United States:

You will please prepare, transmit and deliver to the Clerk of the United States Circuit Court of Appeals for the Ninth Circuit copies duly certified as correct of the following documents and records in the above-entitled cause in connection with the petition for review by the said Circuit Court of Appeals for the Ninth Circuit, heretofore filed by the Commissioner of Internal Revenue:

1. Docket entries of the proceedings before the Board of Tax Appeals (now the Tax Court of the United States).

2. Pleadings before the Board:

(a) Petition, including annexed copy of deficiency notice;

(b) Answer.

3. Memorandum Findings of Fact and Opinion, and Decision of the Tax Court.

4. Petition for review, together with proof of service of notice of filing petition for review and of service of a copy of petition for review. [98]

5. Testimony of petitioner's witness Frank J. Brickwedel, pages 18 and 19 of the Official Report of proceedings before the Tax Court, excluding lines 1 to 10, both inclusive, of page 18 and lines 22, to 25, both inclusive, of page 19; pages 22 to 36, both inclusive, excluding lines 1 to 20, both inclusive, of page 22 and lines 15 to 25, both inclusive, of page 36; pages 46 to 55, both inclusive, excluding lines 1 to 3, both inclusive, of page 46;

Testimony of petitioner's witness Blanche M. Sternheim, pages 55 to 61, both inclusive, excluding lines 18 to 25, both inclusive, of page 61;

Petitioner's Exhibits 1, 3 and 5.

6. Statement of Points.

7. Any and all orders enlarging time for the preparation, transmission and delivery of the record.

[In pencil]: Not included in record.

8. This Designation for Record.

F. M. McAULIFFE,

L. C. BAKER,

Counsel for Petitioner on
Review.

14 Montgomery Street,
San Francisco 4, Calif.

Service of a copy of the within Designation is hereby admitted this 30th day of November, 1943, and agreed to:

J. P. WENCHEL, (C. A. R.)
Chief Counsel, Bureau of
Internal Revenue,
Counsel for Respondent on
Review.

[Endorsed]: T.C.U.S. Filed Dec. 14, 1943. [9]

The Tax Court of the United States
Washington

Docket No. 111776

ESTATE OF BEN F. STERNHEIM, Deceased,
WELLS FARGO BANK & UNION TRUST
CO., Executor,

Petitioner,

v.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

CERTIFICATE

I, B. D. Gamble, clerk of The Tax Court of the United States do hereby certify that the foregoing pages, 1 to 99, inclusive, contain and are a true copy of the transcript of record, papers, and proceedings on file and of record in my office as called for by the Praecipe in the appeal (or appeals) as above numbered and entitled.

In testimony whereof, I hereunto set my hand and affix the seal of The Tax Court of the United States, at Washington, in the District of Columbia, this 6th day of January, 1944.

[Seal]

B. D. GAMBLE,

Clerk, The Tax Court of the
United States.

[Endorsed]: No. 10662. United States Circuit Court of Appeals for the Ninth Circuit. Wells Fargo Bank & Union Trust Co., Executor of the Estate of Ben. F. Sternheim, deceased, Petitioner, vs. Commissioner of Internal Revenue, Respondent. Transcript of the Record. Upon Petition to Review a Decision of The Tax Court of the United States.

Filed January 17, 1944.

PAUL P. O'BRIEN,

Clerk of the United States Circuit Court of Appeals
for the Ninth Circuit.

In The United States Circuit Court of Appeals
for the Ninth Circuit

Docket No. 10662

WELLS FARGO BANK & UNION TRUST CO.,
Executor of the Estate of Ben. F. Sternheim,
deceased,

Petitioner,

v.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

DESIGNATION FOR RECORD ON REVIEW
AND STATEMENT OF POINTS

To the Clerk of the United States Circuit Court of
Appeals for the Ninth Circuit:

Pursuant to Rule 19 (6) of your Court, we hereby
set forth a statement of points of petitioner and a
designation of the parts of the record which we
think necessary for the consideration of the petition
for review of the decision of the Tax Court of the
United States, as follows:

1. Petitioner adopts in full the statement of
points filed in the Tax Court of the United States
and transmitted to you as part of the record in the
above entitled matter.

2. Petitioner adopts in full the designation for
record on review filed in the Tax Court of the
United States and transmitted to you as part of the
record in the above entitled matter, and in addition

thereto designates this designation for record on review as part of said record.

F. M. McAULIFFE,

L. C. BAKER,

Attorneys for Petitioner.

Service of a copy of the within designation and statement of points is hereby admitted this day of 1944.

.....
.....

Attorneys for Respondent.

[Endorsed]: Filed Jan. 21, 1944. Paul P. O'Brien, Clerk.

No. 10,662

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

WELLS FARGO BANK & UNION TRUST Co.,
Executor of the Estate of Ben F. Stern-
heim, Deceased,

Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

Upon Petition to Review a Decision of the Tax Court
of the United States.

PETITIONER'S OPENING BRIEF.

F. M. McAULIFFE,

L. C. BAKER,

HELLER, EHRMAN, WHITE & McAULIFFE,

Nevada Bank Building, San Francisco,

Attorneys for Petitioner.

FILED

MAR - 4 1944

PAUL R. O'BRIEN,

CLERK

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as of date of death - 2 Cir. 117-2-97

92-79-2-107-
widow's deduction

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See 125-2-401 holding
mere power to invade does not
defeat deduction
Ithaca Trust practically precluded
consideration of subsequent facts -
yet in arriving at value of trust estate

No. 10,662

IN THE
United States Circuit Court of Appeals
For the Ninth Circuit

WELLS FARGO BANK & UNION TRUST CO.,
Executor of the Estate of Ben F. Stern-
heim, Deceased,

Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

Upon Petition to Review a Decision of the Tax Court
of the United States.

PETITIONER'S OPENING BRIEF.

I.

JURISDICTIONAL STATEMENT.

By this proceeding petitioner, Wells Fargo Bank & Union Trust Co. as executor of the estate of Ben F. Sternheim, deceased, seeks the redetermination of a deficiency in federal estate taxes determined by respondent to be payable on account of the death of decedent.

Jurisdiction of the proceeding was conferred upon the Tax Court of the United States by Section 871 (e) of the Internal Revenue Code (26 U.S.C.A. Sec. 871

(e)). The provisions of Sections 1141 and 1142 of the Internal Revenue Code (26 U.S.C.A. Secs. 1141 and 1142) give jurisdiction to this Court.

The pleadings necessary to the existence of jurisdiction are the petition for redetermination of deficiency (T. 3) and the answer thereto (T. 20).

II.

STATEMENT OF THE CASE AND QUESTION INVOLVED ON APPEAL.

(a) Statement of the case.

This petition for review is concerned with the taxability of gifts in remainder to charitable institutions where the trustee has a qualified power to expend corpus for the benefit of the income beneficiary.

Ben F. Sternheim (hereinafter called "the decedent") died on April 9, 1940, a resident of the City and County of San Francisco, State of California. (T. 13.) He left a will (T. 44), with the provisions of which this petition for review is not concerned, but which has been included in the record in order that the Court may have the complete background of the case.

Part of the estate of the decedent for the purposes of the federal estate tax consisted of property held by Wells Fargo Bank & Union Trust Co. as trustee of a revocable *inter vivos* trust created by the decedent on June 9, 1938. (T. 53, 54 and 55.) The value of the trust estate at the date of decedent's death was approximately \$96,000. (T. 55.) Blanche Sternheim,

sister of the decedent, was named as life beneficiary, the trust agreement having provided that her estate should vest in enjoyment upon the death of the decedent. (T. 61.) Upon the death of Blanche Sternheim the principal of the trust estate is to be distributed among three charitable institutions. (T. 61.)

The trust agreement conferred upon the trustee power in its uncontrolled discretion to withdraw and expend principal of the trust up to ten per cent (10%) per annum of the value thereof in the event of sickness, accident, want or other emergency to the income beneficiary. (T. 62.) The presence of this power prompted the respondent to disallow deduction of the value of the charitable gifts as claimed by petitioner and to determine that petitioner was liable for a deficiency. (T. 12-20.)

Because the evidence shows without contradiction that Blanche Sternheim is possessed of considerable independent means the contention was made at the trial, and is renewed here, that if there was any uncertainty in the value of the charitable remainders of the *inter vivos* trust, it was not "appreciably greater than the general uncertainty that attends human affairs" (*Ithaca Trust Co. v. United States*, 279 U. S. 151, 49 S. Ct. 291, 73 L. Ed. 647), with the result that the value of these remainders was deductible under the provisions of Section 812 (d) of the Internal Revenue Code (26 U.S.C.A. Section 812 (d)).

The evidence showed that after the death of Ben F. Sternheim the trustee of the *inter vivos* trust had

actually exercised the power to make payments of principal to the income beneficiary under peculiar circumstances hereinafter to be related. The Tax Court concluded that, *although in the absence of these payments a different result would have been compelled* (T. 27), the fact of this resort to principal rendered the value of the charitable remainders uncertain with consequent disallowance of the full deduction claimed by petitioner. (T. 27, 28.) But since the annual withdrawal of principal under the power conferred was limited to ten per cent of the value of the trust estate the Tax Court allowed a partial deduction to the extent of the value of the charitable gifts remaining after subtraction of the maximum possible withdrawals of principal during the life expectancy of the income beneficiary. (T. 28, 29.)

(b) Question involved on appeal.

The question involved is whether, as a matter of law, the fact of withdrawal and payment of principal as the result of events which transpired *after the death of decedent* may be employed as the basis for determining that *as of the date of the death of decedent* the value of the charitable remainders was uncertain.

This question was raised in the Tax Court by the introduction into evidence through stipulation of the parties of the fact and amount of the payments from principal (T. 88-92), and by the presentation of argument as to their legal effect.

III. SPECIFICATION OF ERRORS.

1. The Tax Court erred in holding and deciding (T. 29) that the estate is not entitled to a deduction from the decedent's gross estate in the amount of the full value of the remainder interest in charitable institutions created by the revocable *inter vivos* trust agreement.

2. The Tax Court erred in holding and deciding (T. 28) that the withdrawal and payment of principal after the death of decedent by the trustee of the revocable *inter vivos* trust rendered the value of the charitable remainders so uncertain as not to be deductible under Section 812 (d) of the Internal Revenue Code.

IV. ARGUMENT.

(a) SUMMARY.

The uncontradicted evidence compels the conclusion that, measured by the circumstances prevailing at the date of decedent's death, the probability of invasion of the principal of the *inter vivos* trust was so remote as not to affect the value of the charitable remainders.

For the purpose of ascertaining the amount of federal estate tax the value of charitable remainders must be determined strictly as of the date of death. Fortuitous events occurring subsequent to the date of death cannot legally affect the determination of such value nor be employed as a basis for ascertaining whether or not the value of the remainder interests

is sufficiently certain to permit of its deduction in computing the tax.

In order to avoid confusion it should be stated that the argument will be concerned with two *inter vivos* trusts, the first being that created as aforesaid by the decedent for the benefit of Blanche Sternheim and certain charities, and the second being an irrevocable trust created for her own benefit by Blanche Sternheim. For convenience the first trust will be referred to as the "Ben Sternheim trust" and the second as the "Blanche Sternheim trust".

The provision authorizing withdrawal of principal will be called the "emergency clause".

(b) RESUME OF THE CIRCUMSTANCES PREVAILING AT THE DATE OF DEATH OF THE DECEDENT.

Bearing upon the question of whether invasion of the corpus of the Ben Sternheim trust was or was not probable at the date of death, the following points, sustained by uncontradicted evidence found in the record, are pertinent:

1. Blanche Sternheim, the income beneficiary of the Ben Sternheim trust, entered into an irrevocable agreement of trust with respect to her own assets on July 25, 1929, the provisions of which were superseded by an amended trust agreement dated July 31, 1940. (T. 69-80.) Wells Fargo Bank & Union Trust Co. is now the trustee of this trust. (T. 68.)

2. The net income of this trust is payable to Miss Sternheim during her lifetime. (T. 74.)

*More power to invade corpus does not
deduction 1257 2-401*

3. In the event that the net income of this trust should be less than \$600.00 per month, the trustee is directed to withdraw and pay from the principal such part thereof as may be necessary to make up the deficiency. (T. 75.)

4. The value of the assets of this trust is approximately \$138,000.00. (T. 82.)

5. The approximate annual net income of this trust is \$7300.00. (T. 82.)

6. In addition to the net income of this trust Miss Sternheim is entitled, upon her written request, to withdraw ten per cent of the corpus of the trust in any one calendar year. (T. 75.) The trust instrument also contains a provision similar to the emergency clause of the Ben Sternheim trust. (T. 75.)

7. The value of the assets of the Ben Sternheim trust was approximately \$96,000.00. (T. 55.)

8. The annual net income from the Ben Sternheim trust is approximately \$2400.00. (T. 66.)

9. Miss Sternheim is thus entitled to receive a combined annual net income from the two trusts of approximately \$9700.00.

10. Miss Sternheim is in the habit of saving from \$250.00 to \$300.00 per month from her income (T. 97), and is presently in a state of sound health. (T. 98.)

Upon evidence similar to that summarized above this Court has held that, despite the presence of power in the trustee to invade corpus, there was no such uncertainty in the value of charitable remainders as to deprive them of deductibility in computing the federal

estate tax. *Commissioner v. Bank of America National Trust & Savings Association*, 133 Fed. (2d) 753. Furthermore, the Tax Court in the case at bar actually found, and it is submitted properly so found, that these facts, exclusive of that regarding withdrawal of principal after decedent's death, would cause the possibility of invasion of the corpus of the Ben Sternheim trust at the date of death to be so remote as to be unworthy of consideration. (T. 27.)

In reaching the conclusion that the full value of the charitable remainders was not deductible, the Court, therefore, relied solely upon the evidence of these withdrawals. (T. 8.) The question of the legal propriety of resorting to such *ex post facto* occurrences is thus squarely raised, for if the Court thereby committed error its own finding that in the absence of these occurrences the value of the charitable remainders was certain would compel modification of the judgment. Before considering the authorities it will be advisable to discuss briefly the circumstances which induced the invasion of the corpus of the trust.

**(c) RESUME OF THE CIRCUMSTANCES SURROUNDING
THE WITHDRAWAL OF PRINCIPAL.**

The withdrawals of principal after the death of the decedent fall into three categories. The first category grows out of the fact that prior to his death the decedent had acted as the trustee of the Blanche Sternheim trust. (T. 69, 70.) With the acquiescence of Miss Sternheim he had commingled the assets of the

trust with his individual property. (T. 88.) Upon his death the necessity for determining the share of the Blanche Sternheim trust in the unsegregated mass entailed some delay in the payment of income to Miss Sternheim. (T. 88, 89.) In order to compensate Miss Sternheim for this loss of income the trustee of the Ben Sternheim trust made three monthly payments of \$500.00 each to her pursuant to the emergency clause. (T. 89.) However, at the time of making the payments Miss Sternheim expressly agreed to repay the full amount which should ultimately be advanced. The evidence shows that she kept her promise. (T. 89, 90.)

Payments in the second category resulted from the fact that after the death of the decedent the federal government asserted a large income tax deficiency against his testamentary estate and against the assets of the Blanche Sternheim trust. (T. 85, 90.) The alleged liability was primarily that of Sternheim Company, a corporation, but was asserted against the estate and the trust as transferees of the corporate assets through dissolution. (T. 85.)

In the light of the magnitude of the income tax claim (in excess of \$500,000.00 (T. 90)), the trustee of the Blanche Sternheim trust felt compelled to withhold further payment of income to Miss Sternheim as a measure of protection against the possibility of ultimate recovery in full by the government accompanied by probable insufficiency of the combined assets of the trust and of the estate to satisfy the judgment in full. (T. 90, 91 and 92.)

Since no formal or informal claim for income taxes had been asserted against the Ben Sternheim trust (T. 92), a plan was devised by which \$500.00 per month was paid to Miss Sternheim from the principal of the last mentioned trust under the power conferred upon the trustee to expend principal in the event of emergency. (T. 92.) Thus, partial compensation was made to Miss Sternheim for her loss resulting from the retention of the income of her own trust. These payments, comprising a total of \$3700.00, continued until the income tax claims were finally settled. (T. 92.)

The third category of these principal payments involved an expenditure of approximately \$9000.00 towards settlement of the claims for income tax deficiencies, to which reference has been made. (T. 84, 87.) The Tax Court gained the impression that this payment was made in the exercise of the power to withdraw principal in case of emergency. (T. 28.) This impression was erroneous. In order to distribute the burden equitably among the various interests the payment was made in the exercise of the power to compromise (T. 87, 88) conferred by the provisions of the trust instrument (T. 59), after counsel for the trustee had become convinced that the government could and would look to the assets of the Ben Sternheim trust, if necessary, to satisfy its claims in the event of judgment for the full amount of the alleged deficiency. (T. 93.)

(d) THE LEGAL EFFECT OF THE PAYMENTS OF PRINCIPAL

It is well settled that value, for the purpose of the federal estate tax, must be determined as of the date of death untainted by events thereafter transpiring.

In *United States v. Provident Trust Company*, 291 U. S. 272, 54 S. Ct. 389, 78 L. Ed. 793, the Court said:

“Article 53, Treasury Regulations 37, declares that the amount of the deduction in such case is the value at the date of decedent’s death of the remainder interest in the money or property which is devised or bequeathed to charity. It follows that in making a deduction for that interest, the value thereof must be determined from data available at the time of the death of decedent.”

In *Camp v. United States*, 44 Fed. (2d) 126, the Court said:

“In determining the value of the estate of a decedent for purposes of taxation, property owned by him is to be given the value which it had at the time of his death. The estate tax is a tax upon the passing of the estate of decedent, and in determining its amount the value of the estate must be taken at the time that it passes, i.e., at the time of death. Subsequent gains or losses through fluctuation in values or through fortunate or unfortunate trades cannot be considered.”

See, also,

Meader v. United States (Court of Claims), 26 F. Supp. 925.

The leading case on the subject is *Ithaca Trust Company v. United States*, 279 U. S. 151, 49 S. Ct. 291, 73 L. Ed. 647. There the testator created a trust for the benefit of his wife for life with authority to use from the principal any sum that might be necessary suitably to maintain her in as much comfort as she enjoyed at the date of the execution of the will. There were provisions for gifts over to charity to take effect upon the death of the testator's wife. The widow died shortly after the death of her husband and the contention was made by the taxpayer that this operated to increase the value of the charitable remainders. The Court held that it could not have this effect and said:

“The question is whether the amount of the diminution, that is, the length of the postponement, is to be determined by the event as it turned out, of the widow's death within six months, or by mortality tables showing the probabilities as they stood on the day when the testator died. The first impression is that it is absurd to resort to statistical probabilities when you know the fact. But this is due to inaccurate thinking. The estate so far as may be is settled as of the date of the testator's death. The tax is on the act of the testator, not on the receipt of property by the legatee. Therefore the value of the thing to be taxed must be estimated as of the time when the act is done. But the value of property at a given time depends upon the relative intensity of the social desire for it at that time, expressed in the money that it would bring in the market. Like all values, it depends largely on more or less certain prophecies of the future,

and the value is no less real at that time if later the prophecy turns out false than when it comes out true. Tempting as it is to correct uncertain probabilities by the now certain fact, we are of opinion that it cannot be done, but that the value of the wife's life interest must be estimated by the mortality tables."

If the untimely death of the life tenant in the *Ithaca* case could not, as a matter of law, be employed in retrospect as the foundation for determining the value of the charitable gifts at the date of the death, then by the same token the fact of actual resort to the emergency clause in the instant case cannot, as a matter of law, be seized upon as a basis for determining that the value of the charitable gifts was uncertain at the date of death.

The case of *Millard v. Humphrey*, 8 F. Supp. 784 (affirmed in 79 Fed. (2d) 104), is specifically in point. In that case the will provided that the wife of the testator should have the income from the trust estate during her lifetime and further bequeathed and devised to the wife any part of the principal of the residue of the estate which she might need for her support. The remainder interest went to charity. Deduction of the value of the charitable remainder was disallowed by the Commissioner on the ground that it could not be determined because of the right of the wife to invade the principal of the trust fund. It appeared that after the death of the testator an invasion of the principal actually occurred. The Court held that the income of the wife was more than sufficient to support her and that there was therefore no

reasonable possibility of invasion of the principal at the date of death. The deduction was therefore allowed. With respect to the question here in issue the Court said:

“The showing of the above facts, as of the date of the determination of the tax, brings this case within the scope of the cited cases in which the income could be determined as being sufficient to support and maintain the beneficiary. The fact that an invasion did actually occur to the extent of \$6,900. by consent of the remaindermen cannot affect the determination that at the time of decedent’s death the necessity of such an invasion was not foreseeable.”

The payments of principal from the Ben Sternheim trust as a result of the freezing of the income from the Blanche Sternheim trust are governed by the cited cases. The income tax controversy, of which these payments were a by-product, arose after decedent’s death. The action of the trustee of the Blanche Sternheim trust in withholding income had no relation to the circumstances existing at the date of death and certainly was hardly within the realm of reasonable anticipation at that time. In other words, these payments were purely accidental.

Aside from the foregoing considerations the payments in the other two categories hereinbefore described have intrinsic factual features of their own which prevent their having any effect upon the value of the charitable gifts. Those payments which were made during the process of disentangling the assets of the Blanche Sternheim trust from those of the

testamentary estate were made pursuant to an agreement of reimbursement which was performed in full. Obviously this involved no encroachment upon corpus whatever. The contribution toward the income tax settlement was made by way of compromise and therefore had nothing to do with the power to invade corpus here under consideration.

It is therefore respectfully submitted that the Tax Court, after having found that the factual situation prevailing at the date of death precluded any reasonable possibility of invasion of corpus, erred in holding that subsequent payments of principal rendered the value of the charitable gifts uncertain in retrospect.

CONCLUSION.

The deduction claimed by petitioner for the full value of the charitable remainders of the Ben Sternheim trust should be allowed in full and the judgment of the Tax Court should be modified to the extent necessary to effect such allowance.

Dated, San Francisco,

March 3, 1944.

Respectfully submitted,

F. M. McAULIFFE,

L. C. BAKER,

HELLER, EHRMAN, WHITE & McAULIFFE,

Attorneys for Petitioner.

No. 10662

**In the United States Circuit Court of Appeals
for the Ninth Circuit**

WELLS FARGO BANK & UNION TRUST CO., EXECUTOR OF
THE ESTATE OF BEN F. STERNHEIM, DECEASED, PETI-
TIONER

v.

COMMISSIONER OF INTERNAL REVENUE, RESPONDENT

ON PETITION FOR REVIEW OF THE DECISION OF THE TAX
COURT OF THE UNITED STATES

BRIEF FOR THE RESPONDENT

SAMUEL O. CLARK, Jr.,
Assistant Attorney General.

SEWALL KEY,
HELEN R. CARLOSS,
JOSEPH S. PLATT,

Special Assistants to the Attorney General.

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CLERK

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v.

COMMISSIONER OF INTERNAL REVENUE, RESPONDENT

*ON PETITION FOR REVIEW OF THE DECISION OF THE TAX
COURT OF THE UNITED STATES*

BRIEF FOR THE RESPONDENT

OPINION BELOW

The Tax Court rendered a memorandum opinion (R. 22-36), which is not officially reported.

JURISDICTION

This petition involves the determination of federal estate tax due from the estate of Ben F. Sternheim, who died April 9, 1940, a resident of San Francisco, California. Petitioner, Wells Fargo Bank & Union Trust Company, is executor of the decedent's estate. (R. 23.) On April 29, 1942, the Commissioner of Internal Revenue mailed to the petitioner as such executor a notice of deficiency in the amount of \$48,824.39.

(R. 12-20.) Within 90 days thereafter, on July 2, 1942, the petitioner as such executor filed a petition with the United States Board of Tax Appeals (now The Tax Court of the United States) for a redetermination of the deficiency under the provisions of Section 871 of the Internal Revenue Code. (R. 3-20.) The decision of the Tax Court that there was a deficiency of \$16,450.04 was entered on September 3, 1943. (R. 36.) The petition for review by this Court was filed on November 9, 1943 (R. 37-41) under the provisions of Sections 1141 and 1142 of the Internal Revenue Code.

QUESTION PRESENTED

By an instrument dated June 9, 1938, the decedent created a revocable *inter vivos* trust under which, following his death, the income was to be paid to his sister, Blanche M. Sternheim, during her lifetime, with remainder over upon her death to certain charities. The trustee was given the power to invade the principal (up to 10% in any one year) for the benefit of the sister in case of "sickness, accident, want or other emergency."

The question is whether the full value of the remainder is deductible as a gift to charity under Section 812 (d) of the Internal Revenue Code or the deduction must be disallowed to the extent that the corpus could be invaded under the terms of the trust for the benefit of the life beneficiary. The answer depends upon whether the extent to which the corpus (within the 10% limitation) could be diverted was capable of being accurately measured.

STATUTES AND REGULATIONS INVOLVED

Internal Revenue Code:

SEC. 812. NET ESTATE.

For the purpose of the tax the value of the net estate shall be determined, in the case of a citizen or resident of the United States by deducting from the value of the gross estate—

* * * *

(d) [as amended by Section 408 (a) of the Revenue Act of 1942, c. 619, 56 Stat. 798 (effective as of February 11, 1939)] *Transfers for Public Charitable, and Religious Uses.*—The amount of all bequests, legacies, devises, or transfers, * * * to or for the use of any corporation organized and operated exclusively for religious, charitable, scientific, literary, or educational purposes, * * *. (26 U. S. C. 1940 ed., Sec. 812.)

Treasury Regulations 105, promulgated under the estate tax provisions of the Internal Revenue Code:

SEC. 81.44 *Transfers for public, charitable,*

* * * *

religious, etc., uses.—

If a trust is created for both a charitable and a private purpose, deduction may be taken of the value of the beneficial interest in favor of the former only insofar as such interest is presently ascertainable, and hence severable from the interest in favor of the private use. * * *

SEC. 81.46. *Conditional bequests.*— * * *

If the legatee, devisee, donee, or trustee is empowered to divert the property or fund, in whole or in part, to a use or purpose which would have rendered it, to the extent that it is

subject to such power, not deductible had it been directly so bequeathed, devised, or given by the decedent, deduction will be limited to that portion, if any, of the property or fund which is exempt from an exercise of such power.

STATEMENT

The relevant facts as found by the Tax Court (R. 23-26) are substantially as follows:

Prior to his death the decedent, on June 9, 1938, transferred to the Wells Fargo Bank & Union Trust Company of San Francisco, as trustee, policies of insurance on his life in the aggregate amount of \$20,000, and savings accounts of approximately \$73,000. The income of the trust was to be accumulated and added to principal during the life of the decedent. After his death the income was to be paid to his sister, Blanche M. Sternheim, for life. Upon her death the trust estate was to be divided among the Shriners Hospital for Crippled Children of San Francisco, Mount Zion Hospital, San Francisco, in whatever proportion the trustee in its sole discretion might elect. (R. 23.) The trust agreement contained the following provision (R. 62) authorizing the trustee, in certain circumstances, to invade the trust principal (R. 24):

11. The Trustee shall have the power in its uncontrolled discretion to use and apply such part of the principal of the trust estate held for any beneficiary as it may consider suitable or necessary in the interest and for the welfare of such beneficiary in the event of sickness, accident, want, or other emergency of or to any of the beneficiaries then receiving the income from

the trust estate or from any portion thereof; provided that, except as otherwise herein provided, not more than ten percent (10%) of the principal of the trust estate shall be used or applied in any one year for said purposes ~~of~~ any of them.

The decedent reserved the right to amend, alter, or revoke the trust at any time during his lifetime. (R. 24.)

The value of the trust estate at the date of decedent's death was approximately \$97,000. The present value of the assets, which now consist principally of securities, is approximately \$87,000. The trust has yielded annual net income since decedent's death of approximately \$2,100. All of this income has been paid to the life beneficiary. (R. 24, 94.)

At the date of decedent's death Blanche Sternheim was also the life beneficiary of a trust which she herself established in 1929. The decedent was named trustee of this trust and so served until his death. The assets of the trust have a present value of approximately \$138,700. The net income amounts to approximately \$7,300 a year. (R. 24, 25, 82.)

At the time of decedent's death Blanche Sternheim was 60 years of age and in sound health. She resides at the Hotel Californian, San Francisco, where her ordinary living expenses amount to about \$250 or \$300 per month. She regularly saves from \$250 to \$300 a month out of the income which she receives from the above described trusts. She enjoys good health generally and is economical in her living habits. (R. 25, 97-99.)

After decedent's death it was discovered that he had commingled assets of his own estate and those of the trust created by Blanche Sternheim of which he was trustee. Pending a partition of the commingled assets the income distributions from that trust were suspended and Blanche Sternheim was given an allowance of \$500 a month from the corpus of the *inter vivos* trust which decedent had created. This allowance was made by the trustee pursuant to the emergency clause of the trust instrument and upon the agreement of Blanche Sternheim to repay the amounts so withdrawn to the trust. A total of \$1,500 was so paid to her and later repaid to the trust. (R. 25, 88-89.)

Thereafter, and at some time not disclosed by the evidence, payments of \$500 a month for a period of seven or eight months were made to Blanche Sternheim out of the principal of the *inter vivos* trust while the income distributions from both trusts were suspended pending settlement of an income tax controversy affecting the assets of the trusts. The income-tax controversy referred to involved a transferee liability for income taxes of a corporation known as the Sternheim Company, the stock of which had all been owned by the decedent and Blanche Sternheim. The Commissioner asserted the transferee liability both against Blanche Sternheim and decedent's estate. In final settlement of the matter, and upon the insistence of Blanche Sternheim, the trustee of the *inter vivos* trust, which was also the executor of the decedent's estate, paid to the Collector of Internal Revenue

\$8,999.16 out of the principal of the trust in part satisfaction of her transferee liability. (R. 26, 84, 85, 92.)

The Tax Court decided on the basis of its findings (including specifically the evidence of actual invasions of the principal after the decedent's death) that the remainder to the charities was not deductible to the extent of the 10% of the principal each year during the life expectancy of the decedent's sister which was subject to invasion for her benefit. (R. 26-29.)

The Tax Court accordingly determined the deficiency to be \$16,450.04 upon the basis of the foregoing holding and certain other items not now in issue.

SUMMARY OF ARGUMENT

The Tax Court was bound as a matter of law, under the applicable regulations and a recent decision of the Supreme Court,¹ to uphold the Commissioner's disallowance of the deduction to the extent that the corpus of the trust was not exempt from invasion. The provisions of the instrument authorizing invasion of the corpus "in the event of sickness, accident, want, or other emergency" introduced factors which, in the language of the Supreme Court, "do not lend themselves to reliable prediction," which are not "capable of being stated in definite terms of money" and which "cannot be accounted for accurately by reliable statistical data and techniques." The Tax Court properly disallowed the deduction to the extent indicated. It is immaterial that the Tax Court may have based its correct decision upon the wrong ground.

¹ *Merchants Bank v. Commissioner*, 320 U. S. 256.

ARGUMENT

Since the extent to which the corpus (within the 10% limitation) could be diverted from the charities was not calculable or capable of being stated in definite terms of money, the deduction must be disallowed under section 812 (d) of the Internal Revenue Code to the extent that the corpus is not exempt from invasion under the terms of the trust

The clause of the trust instrument authorizing invasion of the corpus for a noncharitable purpose is as follows (R. 24, 62):

11. The Trustee shall have the power in its uncontrolled discretion to use and apply such part of the principal of the trust estate held for any beneficiary as it may consider suitable or necessary in the interest and for the welfare of such beneficiary in the event of sickness, accident, want, or other emergency of or to any of the beneficiaries then receiving the income from the trust estate or from any portion thereof; provided that, except as otherwise herein provided, not more than ten percent (10%) of the principal of the trust estate shall be used or applied in any one year for said purposes or any of them.

Section 81.44 of Treasury Regulations 105, *supra*, permits the deduction in respect to a charitable gift "only insofar as such interest is presently ascertainable." Section 81.46 of Treasury Regulations 105, *supra*, provides that if the gift is subject to diversion in whole or in part to a noncharitable purpose, the deduction "will be limited to that portion, if any, of the property or fund which is exempt from an exercise of such power." These regulations were approved by

the Supreme Court in *Merchants Bank v. Commissioner*, 320 U. S. 256, 260:

These Regulations are appropriate implementations of § 303 (a) (3) [now Section 812 (d)], and, having been in effect under successive reenactments of that provision, define the framework of the inquiry in cases of this sort.

The corpus of the trust in the instant case is clearly not exempt from diversion within the meaning of Section 81.46 of the regulations to the extent of 10% thereof each year during the lifetime of the decedent's sister.

In the *Merchants Bank* case, decided by the Supreme Court on November 15, 1943 (after the decision of the Tax Court in the instant case) the will authorized invasion of the corpus (p. 258) "for the comfort, support, maintenance and/or happiness of my said wife." Evidence was presented by the taxpayer as to the wife's modest mode of life and her substantial resources within and without the trust, evidence similar to that offered on behalf of the taxpayer in the instant case. The Tax Court (then the Board of Tax Appeals) had held on the basis of this evidence, following the language of *Ithaca Trust Co. v. United States*, 279 U. S. 151, that the charitable remainder was affected by "no uncertainty * * * appreciably greater than the general uncertainty that attends human affairs," and had accordingly allowed the deduction in full. *Estate of Field v. Commissioner*, 45 B. T. A. 270, 273. The decision of the Tax Court was reversed by the Circuit Court of Appeals for the First Circuit *sub nom. Commissioner v. Mer-*

chants Nat. Bank of Boston, 132 F. 2d 483, and certiorari was granted by the Supreme Court.

The Supreme Court looks to the will for the answer to the question whether the extent to which the corpus is subject to diversion can be measured accurately, and lays down the rule to be followed in such cases as follows (320 U. S. at p. 261):

For a deduction under § 303 (a) (3) to be allowed, Congress and the Treasury require that a highly reliable appraisal of the amount the charity will receive be available, and made, at the death of the testator. * * * Only where the conditions on which the extent of invasion of the corpus depends are fixed by reference to some readily ascertainable and reliably predictable facts do the amounts which will be diverted from the charity and the present value of the bequest become adequately measurable. And, in these cases, the taxpayer has the burden of establishing that the amounts which will either be spent by the private beneficiary or reach the charity are thus accurately calculable.

The Court distinguishes the *Ithaca Trust* case where diversion for the widow's benefit was authorized (p. 154) to the extent necessary "to suitably maintain her in as much comfort as she now enjoys," on the ground that the diversion there was subject to "a fixed standard based on the widow's prior way of life" (p. 261).

Under the rule of the *Merchants Bank* case it is no longer open to the court, except where reference is made to a fixed objective standard, to determine on the basis of extrinsic evidence, as suggested in the *Ithaca Trust* case, that the charitable gifts are affected by

“no uncertainty * * * appreciably greater than the general uncertainty that attends human affairs.” The deduction must be disallowed to the extent that the charitable gift is not exempt from diversion to a noncharitable purpose. The remoteness or unlikelihood of such diversion is immaterial.²

In the instant case diversion is authorized for the benefit of the decedent’s sister “in the event of sickness, accident, want, or other emergency.” (R. 24). No reference is made to the sister’s existing way of life or to any other objective standard. Invasion of the corpus is not restricted to purposes of “maintenance and support.” Cf. *Lucas v. Merchantile Trust Co.*, 43 F. 2d 39 (C. C. A. 8th); *First Nat. Bank v. Snead*, 24 F. 2d 186 (C. C. A. 5th); and *Hartford-Connecticut Trust Co. v. Eaton*, 36 F. 2d 710 (C. C. A. 2d). The decedent apparently considered that his sister would have ample means for maintenance and support according to her accustomed standard, the income of the trust and her other resources being more than sufficient for this purpose.

It was the unforeseen casualty which the decedent had in mind, a prolonged illness, a disabling accident, contingencies which cannot be anticipated. The inclusion of “other emergencies” practically eliminates all check upon the trustee and makes possible the invasion of the corpus in case of financial need or embarrassment on the part of the beneficiary, whatever

² The application of this rule is also involved in *Commissioner v. Wells Fargo Bank & Trust Co.* (Mary A. Hume Estate), pending in this Court, docket No. 10649, decided by the Tax Court prior to the *Merchants Bank* decision.

the cause. The Century Dictionary defines "emergency" as "a sudden or unexpected happening; an unforeseen occurrence or condition * * * something not calculated upon." The amounts which might be diverted under this provision to the decedent's sister out of the corpus of this trust obviously could not be measured or calculated or even estimated in advance. The nature and unforeseeability of the contingencies upon which invasion of the corpus was made to depend are further emphasized by counsel for the taxpayer in their brief referring to the occasions which gave rise to the invasion of the corpus (p. 14):

The action of the trustee of the Blanche Sternheim trust in withholding income had no relation to the circumstances existing at the date of death and certainly was hardly within the realm of reasonable anticipation at that time. In other words, these payments were purely accidental.

Opposing counsel assert that the contingencies which gave rise to the payments actually made could not have been foreseen in advance, thereby in effect conceding the critical point at issue, that the instrument is to be construed as authorizing the invasion of the corpus upon unforeseeable contingencies.

Before the *Merchants Bank* decision was rendered by the Supreme Court, this Court had decided *Commissioner v. Bank of America, etc.*, 133 F. 2d 753, 755, where invasion of the corpus was authorized in case of "accident, illness or other unusual circumstances." The Court referred to the decision of the Circuit Court of Appeals for the First Circuit in the *Merchants*

Bank case, 132 F. 2d 483, as supporting the Commissioner's view that the mere possibility of invasion of the corpus was sufficient to defeat the deduction. This Court indicated that the *Merchants Bank* case might "perhaps" be distinguished on its facts from the case then before the court. Conceivably there is a distinction between the authority to invade the corpus for the "happiness" of the life tenant (as in the *Merchants Bank* case) which would require the application of a subjective test, and the authority to divert in the event of "sickness, accident, want, or other emergency," occurrences or conditions which are presumably objective. But for purposes of applying the rule of the *Merchants Bank* case, it is submitted, there is no distinction.³ In either case the basis for the invasion of the corpus is not to be foreseen in advance and the extent to which the corpus may be invaded cannot therefore be calculated.⁴

³ In *Henricksen v. Baker-Boyer Nat. Bank.*, 139 F. 2d 877, rehearing denied March 17, 1944, this Court stated the issue in terms of the *Merchants Bank* case.

⁴ It may be noted in passing (and entirely apart from the rule in the *Merchants Bank* case) that the *Bank of America* case is distinguishable on its facts from the instant case. There the beneficiary was given an annuity of \$250 per month, substantially less than the entire income of the trust; an excess fund of some \$4,000 had accumulated in the income account during a period of four years and was available to the life beneficiary in case of need before any invasion of the principal could take place. This is similar to the case of *Commissioner v. F. G. Bonfils Trust*, 115 F. 2d 788 (C. C. A. 10th), where the charitable deduction was also allowed. The instant case presents an entirely different situation. The entire income is paid out periodically to the life beneficiary, no reserve is accumulated, and the only fund available for increased payments to the life beneficiary is the principal itself.

Under the plain language of the regulations and the rule of the *Merchants Bank* case, the Tax Court was required as a matter of law to disallow the deduction to the extent that the corpus of the trust was not exempt from invasion for the benefit of the decedent's sister.

The petitioners do not mention the decision in the *Merchants Bank* case. Instead, they base their whole argument on the assumption that whether or not the full value of the remainder may be deducted as a bequest to charity turns upon the probability of invasion of the principal of the trust, arguing on the basis of the *Ithaca Trust* case that that probability must be determined exclusively by circumstances prevailing at the date of the decedent's death, and that the Tax Court erred in relying on circumstances occurring subsequent thereto as a basis for its determination that the probability of invasion was not so remote as not to affect the gift to the charity.

The decision of the Tax Court in this case was rendered some months before the decision in the *Merchants Bank* case, and the Tax Court felt itself bound by the language of the opinion in *Ithaca Trust Co. v. United States, supra*, to determine as a matter of fact whether the remainder was likely to be invaded. In doing so it considered the instrument itself, the evidence of the life beneficiary's outside resources, her health and way of life and evidence that on three separate occasions after the decedent's death there had been actual invasions of the corpus, and reached the conclusion that the deduction should be disallowed

to the extent of 10% of the principal each year during the life expectancy of the sister, that being the maximum amount by which the corpus could be diverted. Under the *Merchants Bank* decision the disallowance of that amount was required, not by virtue of the fact that probabilities of invasion were not negligible but because no standard for invasion had been fixed which could be measured in terms of money. The decision of the Tax Court was therefore correct though it gave the wrong reason.

If, however, as the petitioners erroneously assume, the probability of invasion were the controlling factor, we think that it was not error for the Tax Court to consider evidence showing that on three separate occasions after the decedent's death there had been actual invasions of the corpus, for the reason that this evidence showed how the parties themselves construed the trust.⁵ On two occasions allowances of \$500 per month were paid to the decedent's sister out of the principal of the trust during periods while her other income was temporarily cut off. (R. 25, 26, 88, 89, 92.) The aggregate of such payments was \$5,200. On a third occasion approximately \$9,000 was paid out of principal upon the insistence of the sister in partial settlement of her individual income-tax liability. (R. 26, 84-85.) The likelihood of invasion depended in part on whether the language of the emergency clause was to be liberally or narrowly construed. The parties

⁵ The contemporaneous and practical construction given to an instrument by the parties is strong evidence of its meaning. *Bell v. Staahe*, 141 Cal. 186, 201; *Miller v. Security-First Nat. Bk. of L. A.*, 219 Cal. 120; *In re Leupp*, 108 N. J. Eq. 49.

by their practical construction have given the answer.⁶ An "emergency" is any event affecting the income of the life beneficiary or any financial obligation of the life beneficiary however arising.⁷

If the allowance of the deduction had depended upon the likelihood of invasion such evidence should properly have been considered, and the finding of the Tax Court that the probability of invasion was not so remote as not to affect the value of the charitable gift would, if material, be conclusive upon this Court. But these questions are moot, in view of the decision in the *Merchants Bank* case. It is not necessary to look beyond the terms of the trust instrument itself to decide whether or not a standard for invasion was prescribed which was susceptible of being measured in terms of money. What would be required for the use of the life beneficiary in the event of sickness, accident, want or other emergency is clearly just as unpredictable in this case as what would be required for

⁶ The actions of the parties are significant also as placing the taxpayer in an inconsistent position. The taxpayer, while contending that the language of the emergency clause is so limited in scope that it may be eliminated from practical consideration, insists that its actions as trustee and those of the life tenant (the party beneficially interested) tending to support a most liberal construction should not have been considered by the Tax Court. Compare *Widney v. S. Pacific Co.*, 120 Cal. App. 241; *Malinow v. Dorenbaum*, 51 Cal. App. 2d 645; *Miller v. Security-First Nat. Bk. of L. A.*, *supra*.

⁷ The practical construction of the instrument adopted by the trustee was particularly significant since the remaindermen, the charities, were not in a position to object individually to the actions of the trustee, the share of the corpus to be allocated to each of the three charities depending upon the sole, uncontrolled and absolute discretion of the trustee. (R. 61-62.)

the "happiness" of the life tenant in the *Merchants Bank* case. Since there is no standard except the 10% limitation which can be measured in terms of money the deduction must be limited to the amount which is exempt under the instrument from the power of diversion.

It is well settled that the decision of the Tax Court must be affirmed if it is right for any reason. *Helvering v. Gowran*, 302 U. S. 238. It is therefore immaterial that the Tax Court based its decision on the wrong reason or, if such was the case, that it considered evidence that was not material. The error, if any, was harmless error. The Tax Court found all of the facts which are necessary for this Court to decide the issue of law here involved on the basis of correct principles as established by the *Merchants Bank* case. The decision of the Tax Court was correct, though based on an erroneous reason, and should be affirmed.

CONCLUSION

The decision of the Tax Court should be affirmed.

Respectfully submitted,

SAMUEL O. CLARK, Jr.,
Assistant Attorney General.

SEWALL KEY,

HELEN R. CARLOSS,

JOSEPH S. PLATT,

Special Assistants to the Attorney General.

MARCH, 1944.

No. 10,662

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

WELLS FARGO BANK & UNION TRUST CO.,
Executor of the Estate of Ben F. Stern-
heim, Deceased,

Petitioner,

VS.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

Upon Petition to Review a Decision of the Tax Court
of the United States.

PETITIONER'S CLOSING BRIEF.

F. M. MCAULIFFE,

L. C. BAKER,

HELLER, EHRLMAN, WHITE & MCAULIFFE,

Nevada Bank Building, San Francisco,

Attorneys for Petitioner.

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Respondent.

Upon Petition to Review a Decision of the Tax Court
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PETITIONER'S CLOSING BRIEF.

Although not expressly so stated, the burden of respondent's argument is that *Merchants National Bank v. Commissioner of Internal Revenue*, 320 U.S. 256, requires an approach to this case different from that heretofore adopted by this and other Courts in cases of similar character. Respondent contends, therefore, that irrespective of the merits of the points raised by petitioner in its opening brief the Tax Court was right for the wrong reason.

The identical question is raised in *Commissioner of Internal Revenue v. Wells Fargo Bank & Union*

Trust Co., Executor of the Estate of Mary A. Hume, Deceased, No. 10,649, now pending before this Court. For the purposes of the question here involved the facts of the two cases are similar in substance. Consequently, the decision in the *Hume* case will control here.

Petitioner herein stands upon the position taken with regard to this question in the brief for respondent in the *Hume* case. To repeat the argument here in full would thus entail surplus effort. Suffice it to say that the *Merchants Bank* case laid down no new principle. The Court merely applied a rule originally stated in *Ithaca Trust Co. v. United States*, 279 U.S. 151, 49 S. Ct. 291, 73 L.Ed. 647, a case upon which this Court and other Courts have relied in concluding that under circumstances similar to those of the instant case the value of charitable remainders was not too uncertain to admit of determination. *Commissioner of Internal Revenue v. Bank of America, N.T. & S.A.*, 133 Fed. (2d) 753. In the *Merchants Bank* case the power to invade principal was much broader than that involved herein. The direction to provide for the *happiness* of the life tenant with liberality would authorize the trustee to invade principal without regard to the independent means of the beneficiary. The opinion indicates that this was the determinative factor in the case. In the present case the Court has found that in the absence of the withdrawals which actually occurred there was no reasonable probability of invasion of principal. It is inconsistent, therefore, in the light of all of the

circumstances prevailing at the date of death, to contend that it is necessary to have a standard by which to measure the amount of withdrawals.

Respondent advances the further argument that the purpose of the testator was to guard against unforeseen contingencies, and based upon this, he contends that there was no method of determining the amount which might be diverted upon the occurrence of such unforeseen events. The position taken by petitioner in its opening brief that the diversions which actually occurred were accidental, and unforeseen at the date of death, is seized upon as a concession in this regard.

This argument is unsound, first because it begs the whole question, and second because if it were carried to its ultimate conclusion it would strike at the very root of the established method of valuing future interests for estate tax purposes. The question which the Tax Court was called upon to determine was as to what lay within the realm of practical foreseeability—not what was unforeseeable. If, as here, it was practicably foreseeable that the possibility of resort to principal was so remote as to be negligible, that which was unforeseeable was not an element to be considered. If unforeseeability were to be accorded any weight, all valuations of future interests for estate tax purposes would be at an impasse, and thus is reached the second reason for concluding that respondent's argument is unsound.

If this argument were to prevail it should cut both ways so as to give the taxpayer a corresponding

benefit. Thus, in a situation such as that involved in *Ithaca Trust Co. v. United States* it was not practically foreseeable that the life tenant would die prior to the expiration of her life expectancy, but respondent's theory would have required this factor to be taken into consideration so as to reduce the taxable value of the life estate. In the *Hume* case, pending before this Court, as aforesaid, it was not foreseeable that the life tenant would die soon after the trust for her benefit had been set up. But under respondent's theory this Court would be required to hold that the death of the life tenant made certain the value of the charitable remainder irrespective of what the Court might otherwise have thought the effect of the *Merchants Bank* case would have been if the life tenant had lived.

It is clear, however, that unforeseeability has no place in the valuation of future interests. Such valuations are based upon what is reasonably foreseeable from the standpoint of experience. Thus, in the case at bar it was reasonably foreseeable that under all of the circumstances there would be no invasion of the principal. This is the factor which should govern the valuation of the charitable remainder—*this is the standard by which the value may be determined in fulfillment of the requirement of the Ithaca Trust Co. case and the Merchants Bank case.*

If this Court should conclude that the *Merchants Bank* case does not overrule *Commissioner v. Bank of America* (supra), the question raised by petitioner's opening brief remains. Respondent does not

dispute the soundness of the principle relied upon by petitioner. He contends only that the action of the trustee in making payments from principal indicates a liberal construction by the parties of the so-called emergency clause, which was implicit in the situation existing at the date of death. In the first place this argument is based upon an assumption unwarranted by the facts; that is, that the action of the trustee amounted to a liberal construction of the emergency clause. The facts show that the life tenant's main source of income had been temporarily eliminated by an accidental situation which ran counter to what was reasonably foreseeable at the date of decedent's death. It was the presence of this source of income, together with other matters, which made negligible the probability of resort to principal. There was nothing upon which a prediction could be based that this source of income would be temporarily unavailable. The uncertainty in this regard was not "appreciably greater than the general uncertainty that attends human affairs". *Ithaca Trust Co. v. United States* (supra). The life tenant was thus affected by an emergency. To resort to this clause in such a situation does not indicate a liberal construction, but merely compliance with the original intent of the testator.

In the second place this reasoning is extraneous to the findings and the approach to the matter adopted by the Tax Court. The vice of the findings and conclusion of the Tax Court lies in the reliance upon an unforeseeable later event as a base for determining

what was foreseeable at an earlier date. This approach is self-contradictory upon its face and it is not cured by arguing that a liberal construction was adopted by the parties.

Dated, San Francisco,
April 12, 1944.

Respectfully submitted,
F. M. McAULIFFE,
L. C. BAKER,
HELLER, EHRLMAN, WHITE & McAULIFFE,
Attorneys for Petitioner.

No. 10690

United States
Circuit Court of Appeals
For the Ninth Circuit.

CLINTON B. McELHENY,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

Transcript of Record

Upon Appeal from the District Court of the United States
for the Northern District of California,
Northern Division

FILED

APR 25 1944

PAUL P. O'BRIEN,
CLERK

No. 10690

United States
Circuit Court of Appeals
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Appellant,
vs.
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ATTORNEYS OF RECORD

Attorney for Appellant:

CHAS. L. GILMORE, Esq.

Capital National Bank Bldg.
Sacramento, California.

Attorneys for Appellee:

FRANK J. HENNESSY, Esq.

United States Attorney

EMMETT J. SEAWELL, Esq.

Assistant U. S. Attorney
Sacramento, Calif.

In the Northern Division of the United States
District Court for the Northern District of
California

INDICTMENT

First Count: (T. 18 USCA, 82)

In the October 1943 term of said Division of
said District Court, the Grand Jurors thereof, on
their oaths present: That

CLINTON B. McELHENY

hereinafter called said defendant, heretofore, to-
wit, on or about the 1st day of January, 1942, at
the Sacramento Air Depot, McClellan Field, in the
County of Sacramento, within the Northern Divi-
sion of the Northern District of California, and
within the jurisdiction of this Court then and there
being, did feloniously, knowingly, wilfully and un-
lawfully take and carry away for his own use, with
intent then and there had by said defendant to
steal and purloin the same, personal property of
the United States, said personal property being
more particularly described as follows:

CLASS 17-B

	Approximate Value
1 Clamp "C" light service, 1 1/4" .....	.10
3 Countersink steel, S.S. 5/8" body, 1/4" shank, 80° incl, angle	2.28
2 Countersink steel, S. S. 5/8" body, 1/2" shank 82° ditto....	1.52
1 Countersink steel, S. S. 3/4" body, 1/2" shank, 54° ditto....	.78
1 Countersink steel, S. S. 3/4" body, 1/2" shank, 60° ditto....	.88
1 Countersink steel, S. S. 3/4" body, 1/2" shank, 78° ditto....	1.40
1 Die & collet 10 - 32, 2" O.D.....	1.00
1 Die & collet 1/4 - 28, 2" O.D.....	1.20

		Approximate Value
1 Die & collet $\frac{3}{8}$ - 16, 2" O.D.....		1.35
1 Die & collet $\frac{5}{16}$ - 24, 2" O.D.....		1.20
1 Die & collet $\frac{1}{2}$ " 20, 2 - $\frac{3}{4}$ " O.D.....		1.75
1 Die & collet $\frac{5}{8}$ - 11, 2 - $\frac{3}{4}$ " O.D.....		1.95
1 Die & collet $\frac{3}{4}$ - 16, 2 - $\frac{3}{4}$ " O.D.....		2.20
1 Die & collet $\frac{1}{2}$ - 13, 2 - $\frac{3}{4}$ " O.D.....		1.75
1 Drill, twist straight shank No. 5, H.S.....		.24
1 Drill, twist straight shank, Letter A"H.S.....		.25
8 Drill, twist straight shank, No. 1D H.S.....		1.68
2 Drill, ditto 14 .....		.40
2 Drill, ditto 22 .....		.34
4 Drill, ditto 24 .....		.64
1 Drill, ditto 8 .....		.22
		[1*]
3 Drill, ditto 15 .....		.60
4 Drill, ditto 16 .....		.76
1 Drill, ditto 29 .....		.14
2 Drill, ditto 20 .....		.34
1 Drill, ditto 23 .....		.16
3 Drill, ditto 28 .....		.42
3 Drill, ditto 21 .....		.51
2 Drill, ditto 26 .....		.32
1 Drill, ditto 25 .....		.16
1 Drill, ditto 22 .....		.17
4 Drill, ditto 30 .....		.56
2 Drill, ditto 33 .....		.26
2 Drill, ditto 27 .....		.32
3 Drill, ditto 38 .....		.36
1 Drill, ditto 13/64 H.S. ....		.21
1 Drill, ditto 5/32 .....		.17
1 Drill, ditto 9/16"		1.33
1 Drill, ditto 33/64" .....		.90
1 Drill, ditto 17/64"		3.50
1 Drill, ditto 7 .....		.22
3 Drill, ditto 18 .....		.57
1 Drill, ditto Letter C.....		.26
1 Drill, ditto E.....		.27
5 Drill, ditto 15/64 H.S.		1.15

*Page numbering appearing at foot of page of original certified Transcript of Record.

		Approximate Value
6 Drill, ditto	7/32	1.38
1 Drill, ditto	19/64" .....	.36
2 Drill, ditto	No. 1 .....	.52
4 Drill, ditto	4	1.00
3 Drill, twist, straight shank No. 6 H.S.....		.72
2 Drill, ditto	3 .....	.52
2 Drill, ditto	9 .....	.44
1 Drill, ditto	3/16 .....	.19
2 Drill, ditto	No. 12 .....	.42
3 Drill, ditto	13 .....	.60
2 Drill, ditto	2 .....	.52
1 Brush, steel wire, 1½" dia. Osborn 68.....		.56
1 Drill, twist, straight shank No. 34 HS.....		.12
1 Drill, ditto	35 .....	.11
4 Drill, ditto	40 .....	.40
1 Drill, ditto	31 .....	.12
3 Drill, ditto	39 .....	.33
1 Drill, ditto	41 .....	.11
1 Drill, ditto	37 .....	.11
1 Drill, ditto	49 .....	.09
1 Drill, ditto	44 .....	.09
1 Drill, ditto	½" H.S. ....	.97
2 Drill, ditto	9/32" .....	.66
5 Drill, ditto	19/64"	1.80
2 Drill, ditto	No. 12 .....	.38
8 Drill, ditto	10.....	1.52
5 Drill, ditto	28.....	.65
4 Drill, ditto	53.....	.36
9 Drill, ditto	46.....	.81
1 Drill, ditto	11.....	.19
1 Drill, ditto	extension ⅛" H.S. ....	.14
1 Drill, ditto	ditto 5/32" .....	.17
2 Drill, ditto	ditto 3/16" .....	.38
2 Drill, star, ½ .....		.22
1 Drill, star, ¾ .....		.19
1 Drill & countersink	3/10 x 3/10 x 1/8.....	.30
1 Drill, ditto	7/16 x 3/16 x 3/16".....	.45
		[2]
1 Extractor, screw ezy-out, #1.....		.15
2 Extractor, ditto	#2.....	.34
3 Extractor, ditto	#3.....	.54

	Approximate Value
2 Extractor, ditto #4.....	.48
2 Extractor, ditto #5.....	.56
1 Extractor, ditto #6.....	.28
1 File, flat, smooth, 8" .....	.20
1 File, square, smooth, 6" .....	.12
2 File, ditto 10".....	.25
1 File, vixon, flat 10" .....	.93
1 File, flat, smooth, 12" .....	.36
1 File, flat, bastard, 12" .....	.15
1 File, half round, smooth, 10" .....	.33
1 File, ditto .....	.14
1 File, warding, bastard, 8" .....	.14
1 File, flat bastard, 6" .....	.13
1 Knife, bastard, 12" .....	.32
1 File, half round bastard, 6" .....	.18
2 File, round bastard, 6" .....	.20
1 File, round bastard, 8" .....	.12
2 File, round smooth, 6" .....	.20
1 File, square, bastard, 8" .....	.12
1 File, three square, smooth, 6" .....	.15
2 File, Swiss pattern, square .....	.36
3 File, ditto oval .....	.57
3 File, ditto flat .....	.57
3 File, ditto half round .....	.57
1 set Figures, stamping gothic 1/16" O-9	4.50
1 Handle, socket wrench, hinge 3/8" sz. dr. ....	.92
1 Head, center, 12" combination set .....	.75
1 Head, protractor, 12" combination set	2.52
1 Blade, combination square .....	.60
1 Chisel, diamond point, 1/4" cutting edge .....	.19
1 Joint, socket wrench, universal, 3/8" sq. dr.	
1 male & female .....	.51
1 set Letters, stamping gothic 1/16" A-Z.....	1.50
4 Handle, file, wood, medium .....	.20
1 File, rotary, round pointed	1.50
1 File, ditto	1.50
1 Extractor, screw, ezy-out #3 .....	.17
2 Punch, drift pin, 1/16".....	.60
1 Punch, ditto 3/32" .....	.18
3 Punch, ditto 1/4" .....	.90
3 Punch, ditto 5/32".....	.63

	Approximate Value
1 Punch, ditto 1/8" .....	.18
5 Punch, ditto 7/32"	1.20
4 Punch, center 5/16"	1.00
6 Tap, hand, taper 6-36	4.98
2 Punch, center spacing (Starrett)	1.40
1 Tap, hand, taper 4-40 .....	.83
3 Tap, ditto 6-40	2.49
7 Tap, ditto 6-32	5.81
5 Tap, ditto 8-32	4.15
3 Tap, ditto 8-36	2.49
14 Tap, ditto 10-32	12.04
9 Tap, ditto 10-24	7.74
1 Tap, ditto 1/4-28 .....	.72
1 Tap, hand, plug 7/16-20	1.35
2 Tap, hand, pipe, taper 1/8-27 .....	.28
1 Tap, hand taper 5/16-18 .....	.71
1 Tap, hand, plug, 7/16-14 .....	.86
1 Tap, hand, taper 5/16"-18 .....	.71
	[3]
1 Tap, hand, plug 1/2-20	1.16
1 Pump, Lehman Bros., size 26 #15229	
1 Torch, welding smith #2 complete with tips	20.44
2 Wheel, buffing, tampico, 8" .....	.86
1 Wheel, abrasive, straight 8 x 3/4 x 1/2	1.51
1 Tool, flaring comb., 3/16" 1/16 - 5/8"	2.25
1 Shears, metal cutting compound leverage, right cut, 1 1/4"	2.13
2 Scriber, machinists double point, 9" .....	.66
1 Saw, circular, metal slitting, 1 1/2" dia. 3/32" thick, 1/2" hole	2.24
1 Saw, circular, ditto 2 3/4 dia. 1/16" thick 1" hole	1.98
1 Saw, ditto 5/16" thick 1" hole	1.15
1 Saw, ditto 1/32" thick 1" hole	1.15
1 Wrench, adj. jaw, single end, 8" .....	.61
1 Wrench, ditto 10" .....	.77
1 Wrench, adj. auto, 10" .....	.80
1 Wrench, OE., D.H. 5° angle 5/16" x 13/32" M.O. ....	.14
2 Pliers, diagonal cutting, 6" .....	.88
1 Tape, measuring, steel 50 ft.	3.56
1 Shears, metal cutting, compound leverage 1 1/4" cut approx., left cut	2.13

	Approximate Value
2 Saw, circular, metal slitting, 3" dia. 1/32" thick 1" hole HS	3.96
1 Saw, circular, ditto 2 3/4" dia. .040 thick x 1" hole.....	1.15
3 Saw, circular, ditto, 3" dia. 3 3/32 thick 1" hole HS....	6.12
3 Saw, circular, ditto 3" dia. 1/8" thick 1" hole HS.....	8.40
2 Reamer, taper pin #3/o	3.24
1 Reamer, ditto #2/o.....	1.62
4 Reamer, ditto #0	6.44
1 Reamer, ditto #1	1.80
5 Reamer, ditto #2	9.90
6 Reamer, ditto #3	12.96
3 Reamer, ditto #4	7.56
1 Reamer, ditto #5	2.70
3 Reamer, hand 3/16" HS	4.68
1 Reamer, hand 13/64" HS	2.12
1 Reamer, hand 15/64" HS	2.12
1 Socket, 12 point, 3/8" sq. dr. 5/16" BO .....	.13
1 Socket, ditto 7/16".....	.13
1 Socket, ditto 1/2".....	.13
1 Socket, ditto 3/4".....	.15
1 Socket, universal, 12 point, 3/8" sq. dr. 1/2" BO.....	.50
1 Socket, ditto 3/4" BO55

CLASS 03-K

1 Gage, oxygen, AD-2215	2.15
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CLASS 05-C

1 Gage, altitude type B-10	15.80
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CLASS 08

1 Cord, extension, 2 plug	1.50
	[4]

CLASS 29

1 Wrap lock60
1 Padlock Master #6	6.60
1 Padlock Huro .....	.70
1 Padlock Olco .....	.80

of the total approximate value of\$279.20

said defendant then and there well knowing that said personal property was then and there the property of the United States of America.

Second Count: (T. 18 USCA, 101)

And the said Grand Jurors, upon their oaths aforesaid, do further present: That the said defendant, on or about the 24th day of November, 1943, in the City of Sacramento, County of Sacramento, in the Northern Division of the Northern District of California and within the jurisdiction of this Court, did then and there unlawfully, knowingly, wilfully and feloniously have in his possession with intent to convert to his own use or gain, certain personal property of the United States, said property being more particularly described under Class 17-B in the first count of this indictment (reference to which description is hereby made and the same by reference incorporated herein with the same force and effect as though fully set forth), said defendant then and there well knowing that said personal property had theretofore been stolen from and was then and there the property of the United States of America.

Third Count: (T. 18 USCA, 101)

And the said Grand Jurors, upon their oaths aforesaid, do further present: That the said defendant, on or about the 24th day of November, 1943, in the City of Sacramento, County of Sacramento, in the Northern Division of the Northern District of California and within the jurisdiction of this Court, did then and there unlawfully, knowingly, wilfully and feloniously have in his posses-

sion with intent to convert to his own use or gain, personal property of the United States, said personal property being more particularly described as One Gage, oxygen, Ad-2215, Class 03-K, said defendant then and there well knowing that said personal property had theretofore been stolen from and was then and there the property of the United States of America. [5]

Fourth Count: (T. 18 USCA, 101)

And the said Grand Jurors, upon their oaths aforesaid, do further present: That the said defendant, on or about the 24th day of November, 1943, in the City of Sacramento, County of Sacramento, in the Northern Division of the Northern District of California and within the jurisdiction of this Court, did then and there unlawfully, knowingly, wilfully and feloniously have in his possession with intent to convert to his own use or gain, personal property of the United States, said personal property being more particularly described as one Gage, altitude type B-10 Class 05-C, said defendant then and there well knowing that said personal property had theretofore been stolen from and was then and there the property of the United States of America.

Fifth Count: (T. 18 USCA, 101)

And the said Grand Jurors, upon their oaths aforesaid, do further present: That the said defendant, on or about the 24th day of November, 1943, in the City of Sacramento, County of Sacramento, in the Northern Division of the Northern

District of California and within the jurisdiction of this Court, did then and there unlawfully, knowingly, wilfully and feloniously have in his possession with intent to convert to his own use or gain, personal property of the United States, said personal property being more particularly described as one Cord, extension, 2 plug Class 08, said defendant then and there well knowing that said personal property had theretofore been stolen from and was then and there the property of the United States of America.

Sixth Count: (T. 18 USCA, 101)

And the said Grand Jurors, upon their oaths aforesaid, do further present: That the said defendant, on or about the 24th day of November, 1943, in the City of Sacramento, County of Sacramento, in the Northern Division of the Northern District of California and within the jurisdiction of this Court, did then and there unlawfully, [6] knowingly, wilfully and feloniously have in his possession with intent to convert to his own use or gain, personal property of the United States, said personal property being more particularly described as one Wrap lock, one Padlock Master #6, one Padlock Huro, and one Padlock Oleo Class 29, said defendant then and there well knowing that said personal property had theretofore

been stolen from and was then and there the property of the United States of America.

FRANK J. HENNESSY

United States Attorney

By EMMETT J. SEAWELL

Assistant United States Attorney

[Endorsed]: A True Bill. John W. Geeslin,
Foreman Grand Jury.

[Endorsed]: Filed Jan 7 1944. C. W. Calbreath,
Clerk. [7]

At a stated term of the Northern Division of the United States District Court for the Northern District of California, held at the Court Room thereof, in the City of Sacramento, on Wednesday, the 12th day of January, in the year of our Lord one thousand nine hundred and forty-four.

Present: The Honorable Martin I. Welsh, District Judge.

No. 8637

UNITED STATES

vs.

CLINTON B. McELHENY

PLEA OF NOT GUILTY

This case came on this day ex-parte. The defendant was present in Court in custody of the U. S.

Marshal, having been produced by the U. S. Marshal upon a bench warrant hertofore issued, and with Charles L. Gilmore, Esq., his Attorney; and, on motion of Thomas O'Hara, Assistant U. S. Attorney, was called for arraignment. The defendant was informed of the return of the Indictment and asked if he was the person named therein; and, upon his answer that he was, and that his true name was as charged, thereupon waived the reading of the Indictment. The defendant was called to plead, and thereupon plead Not Guilty to the Indictment, which said plea was Ordered entered. The defendant and attorneys for both parties, in Open Court, orally waived trial by Jury. Ordered this case be continued to January 18, 1944, to be set for trial. [8]

At a stated term of the Northern Division of the United States District Court for the Northern District of California, held at the Court Room thereof, in the City of Sacramento, on Wednesday, the 16th day of February, in the year of our Lord one thousand nine hundred and forty-four.

Present: The Honorable Martin I. Welsh, District Judge.

No. 8637

[Title of Cause.]

TRIAL

This case came on regularly this day for trial before the Court sitting without a jury, a trial by

jury having been heretofore orally waived in Open Court by the defendant and the attorneys. The defendant Clinton B. McElheny was present in Court with Charles L. Gilmore, Esq., his Attorney. Emmet J. Seawell, Assistant U. S. Attorney, was present for and on behalf of the United States. Arthur E. Chandler, Warren M. Parker, Max V. Hobbs and Walter E. Moehle were sworn and testified for and on behalf of the United States. Mr. Seawell introduced in evidence and filed U. S. Exhibits Nos. 2, 3, 4, 5, 6, 7, 8, 9, 10, 11 and 12, and introduced for identification U. S. Exhibit No. 1, and the United States rested. Clinton B. McElheny was sworn and testified for and on behalf of the defendant. Mr. Gilmore introduced in evidence and filed defendant's Exhibits Nos. A, B and C. Ordered that the further trial hereof be continued until February 17, 1944, at 10 o'clock a.m. [9]

At a stated term of the Northern Division of the United States District Court for the Northern District of California, held at the Court Room thereof, in the City of Sacramento, on Thursday, the 17th day of February, in the year of our Lord one thousand nine hundred and forty-four.

Present: The Honorable Martin I. Welsh, District Judge.

No. 8637

[Title of Cause.]

FURTHER TRIAL

The attorneys hereto and the defendant herein being present as heretofore, the further trial hereof was thereupon resumed. Clinton B. McElheny was recalled and Thomas E. Dudley was sworn and testified for and on behalf of the defendant. Mr. Gilmore introduced in evidence and filed defendant's Exhibits Nos. D, E, F, G, H, I and J, and introduced for identification defendant's Exhibit No. K, and the defendant rested. Arthur E. Chandler was recalled and testified for and on behalf of the United States, and the United States rested. Thereupon the evidence was closed. After argument by Mr. Gilmore to the Court, it is Ordered that this case be and the same is hereby continued until February 18, 1944, at 1:30 o'clock p.m. [10]

At a stated term of the Northern Division of the United States District Court for the Northern District of California, held at the Court Room thereof, in the City of Sacramento, on Friday, the 18th day of February, in the year of our Lord one thousand nine hundred and forty-four.

Present: The Honorable Martin I. Welsh, District Judge.

No. 8637

[Title of Cause.]

FURTHER TRIAL

The attorneys and the defendant being present as heretofore, the further trial of this case was thereupon resumed. After argument by Mr. Seawell, the case was submitted to the Court for consideration and decision, and the same being fully considered, it is Ordered that the defendant be and he is hereby adjudged Guilty on the First Count of the Indictment. On motion of Mr. Gilmore, and with the consent of Mr. Seawell, it is Ordered that Counts 2, 3, 4, 5, and 6 be and they are hereby dismissed. Mr. Gilmore made a motion for a new trial, which said motion was Ordered denied. The defendant was called for judgment, and the defendant having been now asked whether he has anything to say why judgment should not be pronounced against him, and no sufficient cause to the contrary being shown or appearing to the Court, It Is By The Court Ordered And Adjudged that the defendant, having been found Guilty of said offenses, is hereby committed to the custody of the

Attorney General or his authorized representative for imprisonment for the period of One (1) Year in a County Jail, and that judgment be entered herein accordingly. It is Further Ordered that the Clerk deliver a certified copy of this judgment and commitment to the U. S. Marshal or other qualified officer and that the same shall serve as the commitment herein. It is further Ordered that the bond heretofore given herein for the appearance of the defendant herein, be and the same is hereby exonerated and sureties thereon discharged. [11]

District Court of the United States, Northern
District of California—Northern Division

UNITED STATES

vs.

CLINTON B. McELHENY

No. 8637—Criminal Indictment in Six counts for violation of U. S. C., Title 18 Secs. 82, 101 (Theft and possession of Government property)

JUDGMENT AND COMMITMENT

On this 18th day of February, 1944, came the United States Attorney, and the defendant Clinton B. McElheny appearing in proper person, and by counsel, and

The defendant having been adjudged guilty by the Court of the offenses charged in the 1st Count of the Indictment in the above-entitled cause, to-wit:

On or about the 1st day of January, 1942, at the Sacramento Air Depot, McClellan Field, California, defendant did feloniously and unlawfully take and carry away for his own use, personal property of the United States, and the defendant having been now asked whether he has anything to say why judgment should not be pronounced against him, and no sufficient cause to the contrary being shown or appearing to the Court, It Is By The Court

Ordered and Adjudged that the defendant, having been found guilty of said offenses, is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for the period of One (1) year

It Is Further Ordered that Counts 2, 3, 4, 5 and 6 of the Indictment, be and the same are hereby dismissed.

It Is Further Ordered that the Clerk deliver a certified copy of this judgment and commitment to the United States Marshal or other qualified officer and that the same shall serve as the commitment herein.

Examined by:

EMMET J. SEAWELL

Assistant U. S. Attorney

(Signed) MARTIN I. WELSH

United States District Judge.

The Court recommends commitment to County Jail.

[Endorsed]: Entered and filed this 18th day of February, 1944. [12]

[Title of District Court and Cause.]

NOTICE OF APPEAL

Name and address of appellant: Clinton B. McElheny, Route 1, Box 574, Fair Oaks, California.

Name and address of appellant's attorney: Chas. L. Gilmore, 303 Capital National Bank Bldg., Sacramento, (14), California.

Offense: Taking and carrying away with intent to steal personal property of the United States (18 U.S.C.A. Sec. 82).

Date of Judgment: February 18, 1944.

Brief description of judgment or sentence: Guilty of first count of indictment; not guilty of 2nd, 3rd, 4th, 5th and 6th counts and the same were dismissed; sentenced to One (1) year in County Jail on first count.

Name of prison where now confined: Temporarily in County Jail at Sacramento. Motion to admit to bail pending appeal denied by trial court.

I, the above named Appellant, hereby appeal to the United States Circuit Court of Appeals for the Ninth Circuit from the judgment above-mentioned on the grounds set forth below.

Dated: February 21, 1944.

CLINTON B. McELHENY
Appellant.

GROUND OF APPEAL

1. That the Court erred in law by which the substantial rights of defendant were affected, and

which prevented defendant from having a fair trial, in this:

(a) In accepting and allowing in evidence, purported confessions of defendant in violation of defendant's rights under the Fourth, Fifth and Fourteenth Amendments to the United States Constitution; [13]

(b) In refusing to allow or permit defendant to show the laws, rules and regulations of the United States Army governing McClellan Field, under which defendant was employed;

(c) In refusing to allow or permit defendant to present written evidence termed "memorandum receipts" and "passes", to establish that all tools set forth and described in said indictment came lawfully into his possession and for which he was required to account or pay for under the rules and regulations promulgated by the United States Army;

(d) In refusing to allow or permit defendant to present written receipts issued by the Army Command of McClellan Field showing payment to have been made for a large part of the items set forth in said indictment, which canceled memorandum receipts evidencing deductions from pay for other items named, and money receipts showing payment for the remainder, all having been delivered and paid in accordance with the rules and regulations of the United States Army;

(e) In refusing to allow or permit defendant to prove that tools and equipment are allowed and permitted by the United States Army in command

at McClellan Field to be taken from said field by civilian employees;

(f) In refusing to give consideration to the doctrine of reasonable doubt in determining the guilt of defendant;

(g) In refusing to consider or recognize the Articles of War and in particular Article 2 and Section 80 thereof;

(h) In presuming from the mere fact of possession that the articles named in the indictment were stolen by defendant, while adjudging defendant not guilty of possession.

(i) In presuming from the mere fact of possession that defendant took said articles and each of them with intent to steal and purloin the same

CHAS. L. GILMORE

Attorney for Defendant

Due service by copy of the within Notice of Motion admitted this 21st day of February, 1944.

FRANK J. HENNESSY

EMMET J. SEAWELL

Attorneys for Plaintiff

[Endorsed]: Filed Feb 21 1944. [14]

[Title of District Court and Cause.]

ASSIGNMENTS OF ERROR

Now comes the defendant, Clinton B. McElheny, by his Attorney, and says that in the proceeding

herein, and in the orders and judgment entered, there are manifest errors, to-wit:

ASSIGNMENT OF ERROR No. 1

The Court erred in admitting Government's Exhibit No. 2, (10-inch steel wrench):

The testimony of Witness Parker was substantially that wrenches similar to that are bought by contract from Wright Field which is the main depot for buying Army property and tools of this type, but not all tools, are marked "U. S. A." and this wrench is. (Bill of Exceptions, p. 11)

The reasons such Exhibit should not have been admitted are as follows:

1. It was hearsay testimony, and no proper identification of the Wrench that it had ever been at McClellan Field, was had by the witness.

2. It was admitted on the ground of similarity, alone.

ASSIGNMENT OF ERROR No. 2

The Court erred in admitting Government's Exhibit No. 3, (Padlock): [15]

The testimony of witness Parker was substantially that it has a number on it similar to the ones put on at McClellan Field, which they used a long time ago. I used to identify the padlocks at McClellan Field that way a long time ago. They don't use that type of padlock any more. (Bill of Exceptions P. 11.)

The reasons such exhibit should not have been admitted are as follows:

1. It was hearsay testimony and no proper identification was had.

2. It was admitted on the ground of similarity alone.

ASSIGNMENT OF ERROR No. 3

The Court erred in admitting Government's Exhibit No. 4, (Machinist's scriber):

The testimony of witness Parker was substantially that he identified it by the marks "U.S.A." and that is the way these articles are marked at McClellan Field. (Bill of Exceptions P. 11).

The reasons such Exhibit should not have been admitted are:

1. It was hearsay testimony and no proper identification of the wrench that it had ever been at McClellan Field was had by the witness.

2. It was admitted on the ground of similarity alone.

The Court erred in admitting U. S. Exhibit No. 5 (pliers.):

The testimony of witness Parker was substantially that he identified the pliers by the mark "U. S." on them and that all of that type they had in stock at McClellan Field are marked with "U. S." on them. (Bill of Exceptions, P. 11).

The reasons such Exhibit should not have been admitted are:

1. It was hearsay testimony and no proper identification of the pliers that they had ever been at McClellan Field was had by the witness.

2. They were admitted on the ground of similarity alone. [16]

ASSIGNMENT OF ERROR No. 5

The Court erred in admitting U. E. Exhibit No. 6 (Steel Tape):

The testimony of witness Parker was substantially that he identified the tape as having "Air Corps, U. S. Army" on it and that is the way this type of tape is marked at McClellan Field. (Bill of Exceptions, p. 12).

The reasons such exhibit should not have been admitted are:

1. It was hearsay testimony and no proper identification that the tape had ever been at McClellan Field was had by the witness.

2. It was admitted on the ground of similarity alone.

ASSIGNMENT OF ERROR No. 6.

The Court erred in admitting U. S. Exhibit No. 7 (Wrench):

The testimony of witness Parker was substantially that he identified the wrench as coming from McClellan Field for the reason it bore the marking "U. S. A." (Bill of Exceptions p. 12).

The reasons such exhibit should not have been admitted are:

1. It was hearsay testimony and no proper identification that the wrench had ever been at McClellan Field was had by the witness.

2. It was admitted on the ground of similarity alone.

ASSIGNMENT OF ERROR No. 7.

The Court erred in admitting U. S. Exhibit No. 8 (Pliers):

The testimony of witness Parker was substantially that he identified these pliers by the marking "U. S." on them and that there were similar pliers at McClellan Field. (Bill of Exceptions p. 12.)

The reasons such exhibit should not have been admitted are:

1. It was hearsay testimony and no proper identification that the pliers had ever been at McCellan Field was had by the witness.

2. They were admitted on the ground of similarity alone. [17]

ASSIGNMENT OF ERROR No. 8.

The Court erred in admitting U. S. Exhibit No. 9 (Miscellaneous lot of tools). (Bill of Exceptions, p. 12).

The testimony of witness Parker was substantially that he could identify the tools then in a paper bag as they were all marked "U. S. A.", and similar tools were at McClellan Field.

The reasons such Exhibit should not have been admitted are:

1. It was hearsay testimony and no proper identification that the tools had ever been at McClellan Field was had by the witness.

2. They were admitted on the ground of similarity alone.

ASSIGNMENT OF ERROR No. 9.

The Court erred in admitting U. S. Exhibit No. 10 (Statement of defendant taken by Lieutenant Ark—Bill of Exceptions, p. 15).

This statement is as follows:

“24 November 1943,
McClellan Field, California.

“I, Clinton B. McElheny, having been duly warned of my rights under the 24th Article of War and knowing that as a civilian employee of the War Department am fully subject to the processes of a military court or tribunal duly authorized to take oaths, without any threats, coercion or promises of any immunity, do hereby swear and affirm that the statement I am about to make is a true statement.

The only articles of government property I have or had in my possession off the reservation or had any knowledge of having were the articles that Mr. Arthur E. Chandler recovered from my home on November 23, 1943, with the exception of the following listed articles which I disposed of on the 21st of November, 1943:

“A. Three Oxygen Pressure Gauges.

“B. One dozen old files. [18]

“C. One and one-half of two pounds of bolts and nuts.

“D. One electrical plug.

“E. About one-half dozen pieces of 2 inch or 3 inch copper tubing.

“F. About one-half dozen copper tubing $\frac{1}{4}$ inch fittings.

“G. Three pronged electrical plug.

“H. One set of steel stencils.

“The only other exceptions to those listed above are those articles which were given to me on a pass to be taken from McClellan Field for my own personal use, and they are described as follows:

“1. Several hundred boiler tubes.

“2. Approximately 2500 feet of lumber.

“3. Approximately 300 feet of 3 by 3 by $\frac{1}{8}$ formed angle steel.

“4. One boiler base.

“5. Two five gallon cans.

“6. Two alcohol barrels.

“7. Several lengths of flexible conduit.

“There are three pages to this statement.”

Signed: “Clinton B. McElheny.

“Sworn and subscribed before me this 24th day of November, 1943. Howard Ark, First Lieutenant, A. C., Summary Court Officer.”

The testimony in support of the statement was given by witness Sergeant Hubbs, substantially, that preliminary to the taking of this statement, defendant had been before the summary court, interviewed at length, had then gone to his home voluntarily, with witness Chandler, who previously testified such visit was made about 10 o'clock in the evening of November 23, and not on the 24th, and on the 24th some time after 10 o'clock P.M., defendant made the statement before Lieutenant Ark, Sergeant Hubbs, witness Chandler, and another investigator named Cecchettini. The statement shows on its face that defendant was advised the meeting

was a [19] summary court and that the defendant, as a civilian employee of the Field, was subject to its processes.

The reasons such Exhibit should not have been admitted, and that it should have been stricken, are as follows:

1. It was hearsay evidence, did not contain all the evidence and statements obtained and made during the session of the summary court and was an extrajudicial confession obtained by trick and ruse, and without any foundation having been laid for its introduction.

2. Its nature was highly prejudicial to the defendant.

ASSIGNMENT OF ERROR No. 10.

The Court erred in admitting U. S. Exhibit No. 11, statement of defendant to F.B.I. agent Moehle, as follows: (Bill of Exceptions, p. 18.)

“Sacramento, California,
November 29, 1943.

“I, Clinton B. McElheny, make this statement to Walter E. Moehle, whom I know to be a special agent of the Federal Bureau of Investigation. I have been advised I need not make this statement; and no threats or promises have been made to me. I know it may be used in court.

“I have been a civilian employee of the War Department since 1929. I came to the Sacramento Air Depot in 1938 when Rockwell Field, San Diego, was moved to Sacramento, California. I was assistant general superintendent of the Maintenance Division.

On or about December 15, 1941, or January 1942 I removed from the Sacramento Air Depot the items listed below and listed on the sheet identified as List Number 1, Pages 1, 2, 3 and 4. Since about January 1942 I have removed small items, as an occasional nut, bolt, screw and so forth.

“50 taps, hand; 75 drills (large and small of various sizes); 25 files; 25 reamers.

“Most of these items were in various boxes at Sacramento Air [20] Depot and were materials charged out to me.

“I knew these items were property of the United States Government and I knew I should not have them in my possession; and was violating the federal law in so doing.

“I have read the above statement and say it is true.”

Signed: “Clinton B. McElheny.”

“Witnesses by: Walter E. Moehle, Special Agent, F. B. I., Sacramento, Calif., 11/29/43; Robert E. Coeke, Special Agent F. B. I., Sacramento, Calif., 11/29/43.”

The testimony in support of the statement given by witness Moehle, is, in substance, as follows:

That witness invited defendant to come to his office in the postoffice building in Sacramento, which he did on November 29, 1943, and at that time defendant was not under arrest and was not put under arrest by witness. The list of tools attached to the statement was handed to witness by someone else. The tools were not in the office of witness at that time. (List is omitted from state-

ment as it is identical with list contained in first count of indictment). Witness did not state he advised defendant statement would be used against him in court or at all, nor that he was under no compulsion to make any statement.

The reasons such exhibit should not have been admitted are as follows:

1. That it was and is incompetent to prove any of the issues of this case.
2. That is was and is hearsay.
3. That it is in form an extrajudicial statement for which no foundation had been laid.
4. That it was highly prejudicial to defendant.

ASSIGNMENT OF ERROR No. 11.

The Court erred in admitting U. S. Exhibit No. 12, box of tools. (Bill of Exceptions, p. 21.) [21]

The testimony offered in support of the exhibit was stated by counsel for the plaintiff, to wit:

That the box contained tools claimed to have been found at defendant's home; that they were similar to tools used at McClellan Field; that they are the tools described in U. S. Exhibits Nos. 10 and 11. (Bill of Exceptions, p. 15 and 18.)

The reasons why such exhibit should not have been admitted are as follows:

1. There was no identification of any of the tools as having ever been at McClellan Field nor as ever been owned by or in the possession of the United States.
2. That the tools were admitted in evidence on

the ground they were similar to tools in use at McClellan Field, and therefore incompetent.

3. That no evidence independent of the extrajudicial confessions of defendant admitted over objection was introduced connecting the defendant with any of the tools in such exhibit.

4. That the court indulged in a presumption of guilt of defendant as the basis for introduction of said exhibit.

ASSIGNMENT OF ERROR No. 12.

The Court erred in sustaining objection on the grounds of incompetence, immateriality and irrelevancy, to testimony of defendant in attempting to show the method and means provided by the Field to return tools upon transfer to another position on the Field.

The testimony on this point was substantially as follows:

That tools were issued to workmen, foremen and superintendents on memorandums by the Tool Room, and on "Form 81" from the Supply Division. If on memorandums, the employee was charged with them and if not accounted for, the value was deducted from his pay. If on Form 81 they were expendable and non-recoverable and these included the drills up to and including $\frac{1}{4}$ inch and small reamers. [22] This meant the foremen and superintendents obtained three or four dozen at a time and passed them out to the workmen as needed. If the foreman was transferred he had to account for tools on the memorandums and if any

were on hand issued on Form 81, he had to take care of them until he could turn them back in. That defendant was made Assistant Superintendent of Air Craft Shops and thereafter his work day averaged fourteen hours a day, and he had to work all three shifts. He had no place safe from theft to keep any tools he formerly had in his possession and had to take them home which he did in this case. That he had succeeded in clearing up his memorandums to a great extent with the exception of the small items charged against him in the indictment.

That he was asked by his counsel what means were provided at the Field for turning in tools charged against him. (Bill of Exceptions, p. 29.)

Whereupon counsel objected on the ground that the evidence was incompetent, irrelevant and immaterial and sustained by the court.

The reasons why such evidence and testimony should have been admitted were as follows:

1. Witness had already progressed along the line of showing the system established by the Army at the Field for issuing and accounting for tools, and he was entitled to complete the showing as establishing cause for alleged delay in getting these small items from his home to the Field.

2. That such showing was part of his defense in showing affirmatively, there was no intent on his part to violate any law.

3. That such evidence was competent to show his innocence of crime, although the burden was not upon him.

4. That it was relevant to the cause in which he was being tried.

5. That it was material as showing the absence of criminal intent and absence of guilt. [23]

ASSIGNMENT OF ERRORS No. 13.

The Court erred in sustaining objection to introduction in evidence of demand of McClellan Field against defendant in the sum of \$61.24 to cover value of lost tools, which defendant received through the mails. (Bill of Exceptions, p. 33.)

The reasons why such evidence should have been admitted are:

1. That it was competent evidence to show the system at the Field under which employees were issued tools and if not returned, they paid for them.

2. That it was material in showing that the tools came lawfully into his possession.

3. That it was relevant to the issues as showing no intent of defendant to steal any tools.

4. That it was part of the system under which defendant worked and tended to show defendant merely followed the system with no thought of violating any law of the United States.

ASSIGNMENT OF ERROR No. 14.

The Court erred in sustaining objections to introduction in evidence of the following memorandum receipts issued by McClellan Field to defendant and listing tools contained in the indictment:

3 pages, dated Sept. 27, 1939; No. 42-293, dated Jan. 7, 1942; No. 42-3529, dated August 20, 1942;

No. 42-32912, dated June 2, 1942; No. 43-9620, dated Nov. 12, 1942; No. 42-32352, dated June 5, 1942; No. 43-18347, dated May 7, 1943; No. 44-15, dated Nov. 23, 1943; No. 44-3909, dated Nov. 29, 1943; No. 44-69, dated July 1, 1943; No. 43-6431, dated Sept. 26, 1943; No. 43-6564, dated Sept. 26, 1942. (Bill of Exceptions, pp. 33-35.)

The reasons why such memorandums should have been issued are:

1. They showed that all tools named in the indictment, other than those classified as expendable and non-recoverable and other than those owned by defendant, were regularly issued to defendant under the system used at McClellan Field, for which he was charged [24] and which he had paid for.

2. They were competent evidence to prove defendant was not guilty of stealing any of the tools.

3. They were material to his defense.

4. They were relevant to the issue of guilt or innocence of defendant.

ASSIGNMENT OF ERROR No. 15.

The Court erred in sustaining objection to admission of receipt No. E-N-3753, voucher 1-12-44 issued by the Field to defendant either in December, 1943, or January, 1944, showing payment of the sum of \$52.92 for tools. (Bill of Exceptions, p. 35.)

The testimony of defendant regarding the voucher was substantially that before he could get his final check he had to pay for the tools listed

thereon and he made the payment either in December, 1943, or January, 1944. (Bill of Exceptions, p. 35.)

The reasons why the voucher should have been admitted are:

1. That it was part of the system in use at the Field.

2. That it was competent to show the innocence of defendant of either intent to steal or felonious possession of tools.

3. That it was relevant to the issue of guilt or innocence.

4. That it was material to the defense of both theft and possession.

ASSIGNMENT OF ERROR No. 16.

The Court erred in sustaining objection to testimony of defendant as to conversation had with Captain Pearce the day following the date of the alleged confession set forth under Assignment of Error No. 9, *supra*. (Bill of Exceptions, p. 38.)

The testimony of defendant was substantially that after the statement was obtained on November 24, 1943, Captain Pearce was brought in who stated he was the summary court martial officer, representing the Commanding Officer and who said he wished to take testimony. He asked defendant if defendant had a bank account, if [25] defendant knew the Government should not buy from a vendor, said defendant bought materials from vendors, which defendant stated he denied as his

only responsibility was recommending material be purchased. (Bill of Exceptions, p. 38.)

The reasons this testimony and evidence should have been admitted are:

1. It showed the extent of the grilling defendant received in the effort to obtain the so-called confession.

2. It established the fact that this defendant believed and was warranted in his belief that he was on November 25, 1943, still under court martial since its convening on the day previous.

3. It showed the so-called confession was obtained pursuant to third-degree methods.

4. It was competent to show the whole course of the investigation to which this defendant was subjected.

5. It was relevant and material to show the whole of this third-degree proceeding which plaintiff had opened up in its case in chief.

ASSIGNMENT OF ERROR No. 17.

The Court erred in striking out the testimony of plaintiff regarding being in custody of Mr. Chandler.

The defendant testified substantially that he was taken to the "Ark court-martial" by Chandler, that he was in the Chandler's custody all the time, that Chandler practically lived with him during that time. (Bill of Exceptions, p. 39.)

The reasons why this evidence should have been admitted are:

1. It showed that at least the defendant was under surveillance if not under actual arrest as part of court-martial proceedings.

2. It further supported the claim the whole of the alleged court-martial was simply to force a confession. [26]

ASSIGNMENT OF ERROR No. 18.

The Court erred in sustaining objection to introduction in evidence of defendant's exhibit K for identification: Pass for tools, as follows: (Bill of Exceptions, p. 45.)

“SASCMD5-5

8 October 1943.

“To Whom It May Concern:

1. Mr. T. E. Dudley is to be permitted to carry the following to and from his work at this Depot.

1 Set Drawing Instruments.

1 Machinery Hand Book.

1 Triangle.

1 12" ruler, 1 steel rule.

2. He is also permitted to carry partly finished drawings of tools to and from the field. This pass will terminate 1 December 1943.

For: R. G. JAMES,

Captain, Air Corps,

Engine Repair Officer.”

Witness Dudley testified substantially that he was assistant to the supervisor of tools and methods; that they designed tools, rebuilt tools, made fixtures, built buildings, tore them down and moved ma-

chinery; that he had contact with the tool room and supply department; that tools were issued to him for use in his work. (Bill of Exceptions, p. 16.) He was not permitted to go further. (See Assignment of Error No. 19, next following.)

The reasons why this evidence should have been admitted are:

1. It was competent to show the system in use at the field under which employees were permitted to take tools from the Field.

2. It was relevant to the defense of defendant as showing tools could be off the Field and yet lawfully in possession of that individual. [27]

3. It was material to the defense of defendant as showing that persons other than defendant were permitted to take tools from the Field to the homes.

ASSIGNMENT OF ERROR No. 19.

The Court erred in sustaining objection to the testimony of witness Dudley regarding expendable tools, on the sole ground that defendant had already testified on the same point. (Bill of Exceptions, p. 46.)

The testimony of witness Dudley on this point was substantially that expendable tools were tools consisting of a great many items that supervisors or foremen or leaders can draw, which were put out on the line or to mechanics and not charged to anybody; that when they are worn out they are thrown away; that everybody, army officers, laboratories use them; that when they are used that

way no one is called upon to account for them or to return them. (Bill of Exceptions, p. 46.)

The reasons why such evidence should have been admitted are:

1. That it was competent in corroboration of defendant's testimony that small tools, such as defendant was charged with stealing and having unlawfully in his possession were, upon being issued to an employee, classed as expendable and marked off the records at the Field.

2. It was relevant to the defense as showing the impossibility of defendant ever being able to return these small tools to the Field, as there was no record of their existence once they were issued to the employee.

3. It was material as showing absence of reasonable doubt of the guilt of defendant as to any felonious intent of defendant in taking the tools in the first instance.

ASSIGNMENT OF ERROR No. 20.

The Court erred in refusing the offer of counsel for defendant to prove by witness Dudley that all the small drills, as one [28] item of the indictment, were all expendable. (Bill of Exceptions, p. 46.)

The reasons why such evidence should have been admitted are:

1. It was competent to show, as one link of the chain of defense of defendant, that all small drills which defendant was charged in the indictment as having stolen and as having unlawfully in his pos-

session, were of such character that defendant could not return them to the Field.

2. It was relevant to the defense of defendant, as showing no one had nor could identify any of them as coming from or as ever having been on the Field.

3. It was material to the defense of defendant for the above reasons.

ASSIGNMENT OF ERROR No. 21.

The Court erred in sustaining objection of counsel for plaintiff on the grounds of incompetency and irrelevancy to question asked witness Dudley as follows: (Bill of Exceptions, p. 46.)

“Q. Do you know of your own knowledge whether tools from the Field could be taken home by workmen by authority of the officers in charge of the Field and used at home?”

The reasons why such evidence should have been admitted are:

1. It was competent as showing tools in the possession of an employee off the Field were not prima facie evidence of theft or unlawful possession and, in fact, no evidence against defendant at all.

2. It was relevant to the defense for the same reason.

ASSIGNMENT OF ERROR No. 22.

The Court erred in sustaining objection of counsel for plaintiff on the grounds it was incompetent, immaterial and irrelevant and no bearing on the case to question asked witness Dudley as follows: (Bill of Exceptions p. 46.) [29]

“Q. Do you know whether the tool room at McClellan Field finally posted notices to the effect that tools borrowed for home use were to be returned?”

The reasons why such evidence should have been admitted are:

1. It was competent as showing that the taking of tools from the Field for home use by workmen was commonplace.

2. It was material to the defense as rebutting a charge of theft based upon possession of tools off the Field.

3. It was relevant to the issues of theft and unlawful possession as showing total absence of criminal intent of defendant to commit any crime.

ASSIGNMENT OF ERROR No. 23.

The Court erred in sustaining objection of counsel for plaintiff on grounds it was incompetent, irrelevant and immaterial and no bearing on the guilt or innocence of defendant to question asked of witness Dudley as follows: (Bill of Exceptions p. 47.)

“Q. Do you know whether tools and equipment on the Field of usable character were thrown into the junk pile or into the fire pit where anyone could take them if they wanted them?”

The reasons why such evidence should have been admitted are:

1. It was competent to establish that the command at the Field discarded tools and it was common practice for employees to salvage them and

take them home with the knowledge and consent of the Field command; that such proof would rebut the claim of criminal intent charged against defendant.

ASSIGNMENT OF ERROR No. 24.

The Court erred in sustaining objection of counsel for plaintiff on grounds it was incompetent, irrelevant and immaterial, no bearing on the guilt or innocence of defendant to question asked of witness Dudley as follows: (Bill of Exceptions, p. 47.)

“Q. Do you know of your own knowledge whether an employee prior to August, 1943, could obtain a pass from the authorities to [30] take any of that material or tools from the junk pile or fire pit and take it off the Field?”

The reasons why such evidence should have been admitted are:

1. It was competent to establish that the command at the Field, after tools were discarded and junked, issued passes to employees to take such tools from the Field to their homes and that such was the common practice.

2. It was material to the defense as showing that mere possession of tools off the Field could not be considered as evidence either of theft or unlawful possession.

ASSIGNMENT OF ERROR No. 25.

The Court erred in rejecting the offer of proof on behalf of defendant made to show that a foreman issuing tools to workmen would find himself

with two of the same kind for the reason one workman would turn in the bit of a drill, receive a new one, another would turn in the shank and receive one, and when the workmen were shifted and turned in their drills, the foreman would have two drills instead of the one he had been issued, with no provision whereby he could turn in the odd drill to the Field; and further, that upon change of type of tools or equipment at the Field results in all former tools being thrown on the junk pile, sold to dealers in Sacramento and elsewhere or ordered thrown into the fire pit and burned. (Bill of Exceptions, p. 48.)

The reasons why such offer of proof should have been allowed are:

1. It was competent to show that tools from the Field found in the possession of any person off the Field, are not evidence either of theft or of unlawful possession.

2. It was relevant and material to the defense as showing absense of any criminal intent when tools were found in possession of this defendant.

[31]

ASSIGNMENT OF ERROR No. 26.

The Court erred in finding defendant guilty of the first count of the indictment, that of theft, while finding him not guilty of possession on the remaining five counts.

The error of the Court was briefly as follows:

1. The only evidence that could *possible* connect the defendant with any crime was the fact he had tools in his possession.

2. To omit all evidence of possession from the case would leave nothing whereon to base a charge of theft.

3. To convict of theft alone necessitates indulging in a presumption of guilt, a presumption of intent, a presumption against reasonable doubt, resulting in a conviction founded solely upon presumptions based upon presumptions.

ASSIGNMENT OF ERROR No. 27.

The Court erred in refusing defendant a new trial on the grounds set forth in the written motion filed.

Wherefore defendant, Clinton B. McElheny, prays that by reason of the foregoing errors, the judgment entered in the trial Court adjudging him guilty of theft as set forth in the first count of the indictment in this cause be reversed.

Dated: March 8, 1944.

CHAS. L. GILMORE,

Attorney for defendant and
appellant.

[Endorsed]: Filed March 8, 1944. [32]

[Title of District Court and Cause.]

BILL OF EXCEPTIONS

Be It Remembered that heretofore the Grand Jury of the United States in and for the Northern District of California, Northern Division, did find and return to and before the above entitled Court on January 7, 1944, its indictment against the defendant, Clinton B. McElheny, which indictment was and is as follows, to-wit:

[Printer's Note: Indictment is not reproduced here, as it is set out in full at pages 2 to 11 of this printed record.] [1*]

That thereafter and on the 12th day of January, 1944, the defendant, upon being arraigned in person, entered a plea of Not Guilty as to all Counts of said indictment and did in open [7] Court orally waive trial by jury.

Thereafter, on the 17th day of February, 1944, the above cause came on for trial before the Honorable Martin I Welsh, one of the Judges of said Court, sitting without a jury, Emmett J. Seawell, Assistant United States Attorney, appearing as counsel for the United States and Chas. L. Gilmore, appearing as counsel for the defendant.

Whereupon the United States offered and introduced the following evidence and exhibits of evidence, and the following evidence was received or rejected, and objections and motions were made and rulings of the Court were entered, all as follows, to-wit:

*Page numbering appearing at foot of page of original Bill of Exceptions.

ARTHUR CHANDLER,

called as a witness on behalf of plaintiff, having been duly sworn, testified as follows:

My occupation is Investigator for the Air Service Command, Headquarter at McClellan Field. Have been employed approximately one year and am now so employed.

I am acquainted with Clinton B. McElheny who is sitting there with his attorney, Mr. Gilmore.

I had a conversation with Mr. McElheny both at the Intelligence Office and at his residence during November or some time around and about that time in regard to Government property.

I first met Mr. McElheny at the Intelligence Office, November 23, 1943, at which meeting were present Captain Ark, Sergeant Hubbs, Andrew Cecchettini and myself. The defendant said he had taken and had home Government property that belonged to the United States Government and that he would be willing to take an investigator to his home for that purpose of making an investigation to determine what he had that belonged to the United States Government, what he had taken home, and turn over to this investigator at that time all property that was found to be property of the United States Government. After this conversation at approximately 10:00 o'clock P.M. in the evening of November 23, 1943, I [8] went to Mr. McElheny's house with him. He asked me in and we went direct to Mr. McElheny's son's bedroom which he stated contained a tool box of tools. We went

(Testimony of Arthur Chandler.)

into his son's bedroom and Mr. McElheny pointed out this box of tools sitting right on the floor. So he was very careful to identify his personal tools from Government Tools, to remove all Government tools from that box and said that he knew they were Government property and he turned them over to myself and I returned those tools to the Intelligence Officer at McClellan Field. I have seen the majority of those tools in that box which you have just shown me in the residence of Mr. McElheny and several other items were recovered from a barn to the rear of his house and several other items were recovered from a house trailer in the back of the house. Mr. McElheny took me to the barn saying he wanted to be sure there was or was not any Government property in the barn and if so found to turn it over to me to take to McClellan Field. I found some of these items. After we went into the barn we went into the house trailer as Mr. McElheny suggested we would look in the house trailer to see if there was additional Government property there. It was his house trailer and I found in these the extension cord and several pliers. Mr. McElheny admitted that he got them from McClellan Field.

Cross Examination by Counsel for Defendant.

The tools that are in that large envelope bear the United States Government marks and identification and the ones that are in the carton are not marked with the specifications of the United States Government. There is a way of identifying or es-

(Testimony of Arthur Chandler.)

tablishing the fact that those came from McClellan Field other than the statement of Mr. McElheny, as we have the stock tracer from the tool issue who is in charge of all tools and he can explain better than I can the identification of those particular tools.

(Bit or drill exhibited to witness.) That is a standard drill and those taps are standard. [9]

“Q. Isn’t it a fact most any of these, such as reamers can be purchased anywhere”? Objected to by counsel for plaintiff as incompetent, irrelevant and immaterial and outside the direct examination, which objection was sustained by the Court.

WARREN WILFORD PARK

called as a witness on behalf of plaintiff, having been duly sworn, testified as follows:

I am now and for the five years last past have been Supervisor in charge of tool issue at McClellan Field. I am familiar with tools that are issued of that field. The book you have in your hand is a stock list listing small hand tools, published by authority of the Commanding General, Army Air Forces, Headquarters Air Service Command, Patterson Field, Fairfield, Ohio. The witness was asked if it was a stock list issued by the Commanding General and counsel for defendant objected on the ground that it called for an opinion and conclusion of the witness.

(Testimony of Warren Wilford Park.)

The Court then examined the witness on his voir dire and the witness testified in response to questions of the Court as follows:

I have charge of the book. It came from the tool issue, McClellan Field, issued to me in connection with my duties. It came from the Supply Division for the purpose of establishing, keeping our records and getting the correct names of tools. We do not keep the records in this book. We just get the correct names of tools and prices and stock numbers. I am quite familiar with the book.

Whereupon the Court ruled as follows:

“You may use it in regard to the items which will be presented to you, if it is necessary. Use it to identify the articles that are presented to you, as to what they are and where they came from”.

The witness proceeded in his direct examination. The marking on the 10 inch steel wrench just handed to me has the marking on it that is put on the wrenches at McClellan Field, “U. S. Army”. That is the way tools bought under federal specifications are [10] marked at McClellan Field which question was objected to by counsel for defendant as calling for the opinion and conclusion of the witness. No ruling by the Court.

I know how this wrench was bought. They are bought by contract from Wright Field, wrenches similar to that. Wright Field is the main depot for buying government or army property. Not all tools are marked “U.S.A.”. Tools of this type are. That particular wrench is.

(Wrench offered as Government Exhibit No. 2

(Testimony of Warren Wilford Park.)

which was objected to by counsel for defendant on the ground it had not been properly identified, which objection was overruled.) Admitted as Government's Exhibit No. 2.

The padlock just handed to me has a number on it similar to the ones put on at McClellan Field and this number is "155". They did use this to mark the padlocks at one time, a long time ago. They used that way to identify the padlocks at McClellan Field; not all of them, but not now. They don't use that any more. They used it on this type of padlock.

(Padlock offered as Government's Exhibit No. 3 and admitted over the objection by counsel for defendant that it was purely hearsay.)

The item you have in your hand now is a machinist's scriber, double point, nine inches long. It has the same marking as the wrench, "U. S. Army". I identify it by the marks "U.S.A." and that is the way these articles are marked at McClellan Field.

(Machinist's scriber admitted in evidence as Government's Exhibit No. 4, over the objection of counsel for defendant that the same was purely hearsay.)

I can identify the pair of pliers now shown me by the mark "U.S.". All of that type we have in stock are so marked.

(Pliers offered and received in evidence as Government's Exhibit No. 5 over objection of counsel for defendant that the same was hearsay.) [11]

(Testimony of Warren Wilford Park.)

The steel tape you have in your hand is marked "Air Corps, U. S. Army" and that is the way this type of tape is marked at McClellan Field.

(Steel tape offered and received in evidence as Government's Exhibit No. 6 over objection of counsel for defendant that it was hearsay.)

I identify the 8 inch steel wrench shown me by the marking, "U. S. A." which is put on all wrenches of that type at McClellan Field and by that identify this wrench as coming from McClellan Field.

(Wrench offered and received in evidence as Government's Exhibit No. 7 over the objection of counsel for defendant that the same was hearsay.)

The pliers you now show me I identify by the marking "U.S." on it, which letters indicate "United States" to me. We have similar pliers at McClellan Field marked that way.

(Pliers offered and received in evidence as Government's Exhibit No. 8 over objection of counsel for the defendant that the same was hearsay.)

It was then stipulated between counsel that a lot of tools in a paper bag might be exhibited to the witness at one time.

I saw all those tools in that paper bag this morning and I can identify each of them by the mark "U. S. A.", which indicates to me that they are United States Government property and we have similar tools so marked at McClellan Air Field.

(The lot of tools and paper sack were offered and admitted in evidence as government's Exhibit No.

(Testimony of Warren Wilford Park.)

9 over the objection of the counsel for defendant that the same was hearsay.)

I saw all those articles in that box including the electric cord and other articles this morning in your "United States Attorney's office. We have similar articles to those at McClellan Field. They are all listed in the stock list. That is, just the tools. I never saw these particular tools until this morning and [12] never saw them on the field. I checked against my stock list and found all the tools in this box are of a similar type we have at McClellan Field. I never saw anything like that pump out at McClellan Field. With that one exception, all the rest of them are similar to articles out at McClellan Field.

All the exhibits in the box were then offered as Government's Exhibit next in order, to which counsel for defendant objected on the ground it was hearsay, highly irrelevant and on the further ground it called for an opinion and conclusion of the witness and an endeavor to convict on approximation or similarity, to which objection the Court reserved its ruling.

Thereupon the witness further testified on cross examination as follows:

U. S. Exhibit No. 7 is just a standard 8 inch Crescent wrench and I believe similar to those that are used in other places besides the air field. The United States may have tools of similar character in other places than McClellan Field and might be marked "U. S. A." if they are a government organi-

(Testimony of Warren Wilford Park.)

zation. I never went to a second-hand store where they sell Government property and never saw any similar things purchased by private citizens. All I have testified to is that these wrenches are similar to ones on the Field and that is as far as my testimony goes. That holds true to all of the things in the same category including the tape which is a standard steel tape, the two pairs of pliers and the padlock.

MAX V. HUBBS

called as a witness for plaintiff, being duly sworn, testified as follows:

I am a Sergeant at McClellan Field, California, assigned to the Intelligence section of the Sacramento Air Forces, United States Army, and was so employed on November 24, 1943. I know Clinton B. McElheny and he is sitting there in the courtroom. I saw Mr. McElheny on or about November 24, 1943, in the office of [13] the Intelligence Officer at which were present Captain Ark, Mr. Cecchettini, Mr. Chandler and myself. I was present when the defendant gave a statement as to certain Government tools and Government property that he had at his home. I was asked by Captain Ark to write this statement in longhand while it was being given. I recognize the writing on this piece of paper as my handwriting and aside from the heading it was written as expressed by Mr. McElheny. After I had

(Testimony of Max V. Hubbs.)

written it, Mr. McElheny read it, signed it, "Clinton B. McElheny". He identified all pages with his signature.

The statement was then offered in evidence, at which point counsel for defendant asked the Court for the opportunity of reading it as he had never seen it before. Counsel requested the Court for permission to ask the witness a few questions, which was granted.

Cross Examination

Mr. McElheny returned from his home with Mr. Chandler with the property that is exhibited and at that time Captain Ark, who was then Lieutenant Ark, was present, I was present and I believe Mr. Chandler was still there and they discussed this property that was involved after the property was brought from Mr. McElheny's home to the Field. Mr. McElheny was before this group prior to going to his home and he returned with Mr. Chandler with the property to the same group of people. As preliminary to this statement there had been another hearing or interview between the group officers. He was notified to come into the office at his convenience but I do not know who invited him. He arrived after I was there. As to the statement, "I, Clinton B. McElheny having been duly warned of my rights under the 24th Article of War", that means from a military standpoint and affecting those people who come within the Articles of War, there is a provision wherein a person is advised of his rights. The 24th Article of [14] War pertains

(Testimony of Max V. Hubbs.)

to those rights as respects making a statement and the officer taking the statement as explained further in that paragraph, is a representative of the Court,—any military Court, inasmuch as he is a summary court officer especially appointed for that purpose.

The statement further says, “knowing that as a civilian employee of the War Department am fully subject to the processes of a military court or tribunal duly authorized to take oaths” and Captain Ark is appointed as a summary court officer. He is an intelligence officer and an intelligence officer in some cases is appointed as a summary court officer and as such under the military rules he represents the military court in the taking of a statement.

Mr. McElheny at that time was advised of the foregoing fact at that time. He wasn't before a court or tribunal. He was before the Intelligence officer who was the representative of a military court for the purpose of taking the statement. Captain Ark is an intelligence officer and I am not prepared to explain the details as to when that authority begins or ends as to the full responsibility. He is a commissioned officer and I am a non-com.

The statement referred to was offered and received in evidence as U. S. Exhibit No. 10, over the objection of counsel for defendant that no proper foundation had been laid for its admission; that it constituted extrajudicial confession with no foundation made therefor and on the further ground it was pure hearsay. The statement is in words and figures as follows:

(Testimony of Max V. Hubbs.)

“24 November 1943, McClellan Field, California.

I, Clinton B. McElheny, having been duly warned of my rights under the 24th Article of War and knowing that as a civilian employee of the War Department am fully subject to the [15] processes of a military court or tribunal duly authorized to take oaths, without any threats, coercion or promises of any immunity, do hereby swear and affirm that the statement I am about to make is a true statement.

“The only articles of government property I have or had in my possession off the reservation or had any knowledge of having were the articles that Mr. Arthur E. Chandler recovered from my home on November 23, 1943, with the exception of the following listed articles which I disposed of on the 21st of November 1943:

“A. Three Oxygen Pressure Gauges.

“B. One dozen old files.

C. One and one-half of two pounds of bolts and nuts.

“D. One electrical plug.

“E. About one-half dozen pieces of 2 inch or 3 inch copper tubing.

“F. About one-half dozen copper tubing $\frac{1}{4}$ inch fittings.

“G. Three pronged electrical plug.

“H. One set of steel stencils.

“The only other exceptions to those listed above are those articles which were given to me on a pass to be taken from McClellan Field for my own personal use, and they are described as follows:

(Testimony of Max V. Hubbs.)

"1. Several hundred boiler tubes.

"2. Approximately 2500 feet of lumber.

"3. Approximately 300 feet of 3 by 3 by $\frac{1}{8}$ formed angle steel.

"4. One boiler base.

"5. Two five gallon cans.

"6. Two alcohol barrels.

"7. Several lengths of flexible conduit.

"There are three pages to this statement."

Signed: "Clinton B. McElheny. [16]

"Sworn and subscribed before me this 24th day of November, 1943. Howard Ark, First Lieutenant, A. C., Summary Court Officer."

Whereupon counsel for defendant moved to strike out all of the items in the statement not contained in the indictment, which motion was denied by the Court.

Cross Examination

I was present during the discussions and took the statement. The first discussion involved at considerable length a general problem on the basis of which Mr. McElheny was very conversant. The first interview continued for about two hours and the second one was from half hour to an hour. There was a great deal more said between the parties and said by Mr. McElheny than is contained in the statement. That is all that occurred as respects the property involved. There were other discussions that took place concerning problems at McClellan Field at the first meeting. Lieutenant Ark at the second meeting, asked quite a few questions of Mr. McElheny and so did others. I couldn't actually say

(Testimony of Max V. Hubbs.)

whether he made responses to them all. I was present but all those questions and answers are not in the statement.

Redirect Examination

All that was stated in regard to Government's Exhibits 2 to 9 inclusive in regard to these tools is contained in the statement.

Recross Examination

This statement contains references to articles which have been introduced in evidence as plaintiff's Exhibits 1 to 9; also to property that he disposed of and property that he took out on pass.

WALTER E. MOEHLE,

called as a witness for plaintiff, being duly sworn, testified as follows:

I am now and have been for approximately three years a Special Agent, Federal Bureau of Investigation. I am acquainted with Clinton B. McElheny who is sitting at the counsel table. I saw him first at McClellan Field on or about November 29, 1943, and had a [17] conversation with him in regard to the facts of the case as told to me by Captain Ark of the Intelligence Office at McClellan Field. Mr. McElheny was also on the Field at that time and I made an appointment with Mr. McElheny to come to my office here in the Post Office Building. He came to my office on the afternoon of November 29, 1943, at which time there was also present Special Agent Goeke. At that time I reduced to writing what Mr.

(Testimony of Walter E. Moehle.)

McElheny told me. The writing you have shown me is in my handwriting and is the statement that was signed by Mr. McElheny in my presence. He signed the first and the second page. The typewritten pages represent the list of articles that Mr. McElheny stated were recovered from his home and those articles so listed were Government property. He stated at that time the list was correct.

Examination on Voir Dire

On November 29, 1943, at the time this statement was taken, Mr. McElheny was not under arrest. I met him at the Field that day. I do not know when the typewritten list was prepared, but it was handed to me by someone else. I don't remember the exact date. I checked the articles attached here as List No. 1 and reviewed them thoroughly. They were not in my office at the time I interviewed Mr. McElheny. None of the articles in that list were in my possession in my office at the time I questioned Mr. McElheny.

Statement offered as U. S. Exhibit No. 11, to which counsel for defendant objected on the ground it was incompetent; that it was hearsay and that it was in the form of an extrajudicial statement for which no foundation had been laid, which objection was overruled and the document admitted, which reads as follows:

"Sacramento, California, November 29, 1943.

"I, Clinton B. McElheny, make this statement to Walter E. Moehle, whom I know to be a special

agent of the Federal Bureau of Investigation. I have been advised I need not make this statement; [18] and no threats or promises have been made to me. I know it may be used in court.

"I have been a civilian employee of the War Department since 1929. I came to the Sacramento Air Depot in 1938 when Rockwell Field, San Diego, was moved to Sacramento, California. I was assistant general superintendent of the Maintenance Division. On or about December 15, 1921, or January 1942 I removed from the Sacramento Air Depot the items listed below and listed on the sheet identified as List Number 1, Pages 1, 2, 3 and 4. Since about January 1942 I have removed small items, as an occasional nut, bolt, screw and so forth.

"50 taps, hand; 75 drills (large and small of various sizes); 25 files; 25 reamers.

"Most of these items were in various boxes at Sacramento Air Depot and were materials charged out to me.

"I knew these items were property of the United States Government and I knew I should not have them in my possession; and was violating a federal law in so doing.

"I have read the above statement and say it is true."

Signed: "Clinton B. McElheny."

"Witnesses by: Walter E. Moehle, Special Agent, F. B. I., Sacramento, Calif., 11/29/43; Robert E. Goeke, Special Agent F. B. I., Sacramento, Calif., 11/29/43."

Whereupon counsel for the plaintiff offered in evidence a box of tools which had theretofore been marked U. S. Exhibit No. 1 for identification.

To this offer counsel for defendant objected on the ground that there had been no identification of the items in the box. There was no evidence to connect this defendant with either the taking of the tools, or the abstraction of the tools in any way, shape, form or manner; that the only thing that might possibly connect the defendant with them is the fact of similarity; that [19] there was no rule of law under which an individual could be convicted of the crime of theft or by possession simply because of the fact he has in his possession something that is similar to that which another person has; that the United States comes into Court as an individual, bound by the same rules of law and procedure as the lease of its citizens and with no greater rights or privileges; that if there should be a conviction upon similarity it must arise through a presumption of guilt by the Court and not a presumption of innocence; that the mere fact that one has in his possession a thing which is similar in all respects to some item which may be or may not be found in some government bureau, agency or operation is not of and in itself a sufficient showing to convict one of a crime.

Whereupon counsel for the plaintiff said, "I will concede that. There is no argument as to that."

Whereupon counsel for defendant further argued, without the rule of similarity, then the alleged confession itself could not be admitted in evidence; that

there has not been any identification of a single thing in that box and it is insufficient to show that things of a similar character have been abstracted.

To which counsel for the Government stated, "I have conceded that, Counsel. There is no use arguing that."

Counsel for defendant further argued that if the only point that the prosecution has to depend on is the mere matter of similarity, then in that event there was nothing before the Court sufficient to authorize or allow the introduction of anything that was in the box; that witnesses have testified that they are common, ordinarily accepted things, used by anyone and all that we have as a basis for their introduction is an extrajudicial confession taken from an individual who is under a summary court, maintained under the Articles of War, where he is put upon a trial of the case and thereupon certain statements were wrested from [20] him; that he was convicted by a summary court first, followed by an F. B. I. man who takes him in, yet he is not under restraint by any process of law. They had usurped the powers of this Court and upon that wresting from the individual of an extrajudicial confession seek upon that confession alone to bring in evidence they claim is sufficient to convict. To admit it in evidence is to convict him upon extrajudicial testimony in its entirety. If they can identify those things and connect this defendant with any testimony, or any evidence competent in any respect, there would be no objection, but counsel does object

to the violation of a rule of law that has been established and maintained for many years, that evidence of that character is not admissible when there is no other foundation laid except an extrajudicial statement.

The Court overruled the objection and the box of tools was admitted as U. S. Exhibit No. 12.

Whereupon the plaintiff rested and the defendant, to maintain his defense introduced and offered the following evidence.

CLINTON B. McELHENY,

defendant, called as a witness in his own behalf, having been first duly and regularly sworn, testified as follows:

My name is Clinton B. McElheny and I reside on Auburn Boulevard, Fair Oaks District and have resided there for five years. I have been a mechanic and supervisor of Air Craft Shops for approximately 16 years. I went to work as a mechanic and welder for the United States Army Air Corps in San Diego, March 1, 1929; came to McClellan Field in 1939 and have been continuously employed by the United States Army Air Corps. I was so employed from 1939 at McClellan Field until November 25, 1943.

The document you have handed me is headed, "Headquarters, Sacramento Air Service Command" dated November 30, 1943, and is the official suspension by order of Captain Mitchell. The other [21]

(Testimony of Clinton B. McElheny.)

one, dated December 8, 1943, is a notification of personnel action. States the date last worked as November 25, 1943, is correct. When I first went to work at McClellan Field, I was employed as a mechanic and welder supervisor. I had a similar position at San Diego. When we came up here from Rockwell Field, this Field was about 20 per cent complete and I was put in charge of several gangs of men putting the place in condition. I had charge of pipe fittings, some electrical work, some rigging, moving of heavy machinery and in general putting the buildings into condition for occupancy. The buildings were behind schedule and we had to do about three-quarters of it. I was acting foreman then. On April 6, 1942, I was appointed group superintendent, maintenance group, as a plant maintenance. On September 1, 1942, I was made general foreman of Air Craft Shops.

Whereupon, document dated April 6, 1942, Notice of Appointment of defendant, Clinton B. McElheny, from general foreman, general mechanic to group superintendent, maintenance group OA, plant maintenance, offered in evidence as defendant's Exhibit "A".

Also document dated September 1, 1942, change in status from general foreman of maintenance to general foreman of Air Craft Shops McClellan Field, as defendant's Exhibit "B".

Also employee's copy dated October 13, 1942, appointment of defendant from General Foreman, Air

(Testimony of Clinton B. McElheny.)

Craft Shops to Assistant Superintendent Air Craft Shops, as defendant's Exhibit "C".

All of which were objected to by counsel for plaintiff on the ground they had no bearing on the guilt or innocence of the defendant which objection was overruled and the Exhibits admitted in evidence.

In my position as foreman and as assistant general superintendent, it was necessary for me to have tools issued to me from the tool room supply department of the field. The memorandum receipt dated 9/27/39, Sacramento Air Depot Supply, Clinton McElheny, con- [22] sisting of three pages, was issued to me September 27, 1939, and is part of some of the tools which I brought with me from San Diego. There were a great many more than this and prior to my coming to the Depot here from the San Diego Depot, some of my tools were shipped to a Captain Austin. There was a welding machine, welding torches, hoses, welding regulators, and some heavy tools.

Whereupon counsel for the Government interrupted to make an objection that this testimony was foreign to the case and did not involve any article they had there and was incompetent, irrelevant and immaterial.

Whereupon the Court inquired, "What is the purpose?"

Counsel for the defendant stated that it was to show that these tools are issued to this man on

(Testimony of Clinton B. McElheny.)

this memorandum and charged to him and is stating the general nature of what was handed to him; that these tools are only a small part of what this man had and was leading up to the point as to how these tools were first issued to him and how and why they found them at his home; that counsel could proceed only in the ordinary way and if it is not germain it may be subject to a Motion to Strike; that the defendant had been a long time in the service from 1929 and as he has stated, he had to bring a great number of tools from San Diego to this Field in 1939.

Whereupon the Court inquired, "Those tools are not in issue here, are they?"

Whereupon, Counsel for defendant stated, there are some tools right here that are charged that the Court allowed to be introduced in evidence.

Counsel for the plaintiff stated he was not talking about the tools taken to the Field; that counsel was talking about the tools the defendant took to his home.

Whereupon, Counsel for the defendant stated that the defendant [23] is going from the Field to his home and from San Diego to his home too, with tools; that he intended to show by this witness that the witness has had in his possession hundreds of thousands of dollars worth of tools of which these are only a small part.

Whereupon, the Court stated, "We are only interested in the tools taken from the Field".

(Testimony of Clinton B. McElheny.)

Whereupon, Counsel for defendant said, I am leading into that now. I can show them on his memorandum as they are charged to him. Then I will show that a lot of this stuff has been paid for; that it has been deducted from his pay. We have the receipts. I am showing that this man is no thief. He has been too long in the service. Just as proud of his position——

Whereupon the Court interjected, “There is no need to argue now. Proceed”.

Whereupon, Counsel for defendant stated he had given Counsel a large number of these particular memorandums and that some of these items you will find right here.

Whereupon Counsel for the plaintiff read off some of the items as follows, with the remarks:

One refers to Blue Ribbon bicycles. There are no bicycles here.

The next one refers to a paper fastening machine. There is nothing like that here.

The third one refers to a precision measurement book. There are no books here.

He has given me one referring to a level, machinery testing. There is no level in this case.

He has given me a lubricator, pressure type. There is no lubricator, pressure type here.

Fan, desk and wall.

“I assume this man was at the Field and had different tools charged to him. I am not talking about the tools he had charged [24] to him and

(Testimony of Clinton B. McElheny.)

issued in his work. I am talking about tools he took from the Field and took to his home which he stated he knew was wrong and against the law to do."

At which point the Court stated, "That is the issue."

Whereupon counsel for the defendant stated that he was endeavoring to show the system in vogue at the field; to show that everything that he got was on a memorandum; that the defendant was charged with these tools and that the individual working at the field had tools issued and charged to him and when he turned some in he gets a credit. Those he hasn't turned in are deducted from his pay.

Whereupon the Court stated the issue was whether the defendant took these particular tools from McClellan Field and defendant's counsel then stated that he brought a lot of the tools in evidence from San Diego.

Whereupon, counsel for the Government stated he was withdrawing the article described in the indictment as 1 pump, Lehman Brothers, size 26, number 15229.

Whereupon, defendant identified one Warding eight inch flat file in evidence as being included in his memorandum dated June 2, 1942, number 4223192 on page 2 thereof and also one flat file, bastard No. 2 cut six inches; also one-half round bastard file, ten inch; also one-half round 8 inch;

(Testimony of Clinton B. McElheny.)

also one flat 10 inch; also one 8 inch; also one 12 inch; also one knife file.

Whereupon the Court inquired, at the suggestion of Counsel for plaintiff, as to the purpose of this examination. Defendant's counsel then stated that these tools were issued to him on the memorandum exhibited, which memorandum was canceled by the field, showing that defendant had bought the tools and paid for them and that if the Government had any action against the defendant, it was a civil suit. Further, that the showing was being made to show the absence of any felonious intent or any act of stealing, as these [25] tools were regularly issued to him by the tool section on these memorandums.

Examination on Voir Dire

By Mr. Seawell.

These tools I have identified are tools set forth on this memorandum. Other tools shown are expendable material. These I have identified I paid for in November. I have had hundreds of articles issued to me out there and can identify these particular items as I had them at home. I did not know I should not have had them at home. I was told by the officer at the Court Martial trial I had committed an offense by taking tools home which were charged to me. I thereafter told Mr. Moehle I shouldn't have them at home and violated a Federal law in so doing. I didn't know that a lot of these weren't charged to me other than that they were expendable items.

(Testimony of Clinton B. McElheny.)

Whereupon Counsel for plaintiff stated he could not see the materiality of this testimony; that the defendant took government property home and converted it to his own use, which is the essence of the charge; that it made no difference that some might have been charged to him and others were not.

Counsel for defendant argued that if the defendant was charged with the tools; he did not take them with felonious intent and that certain items were issued on memorandums and others were issued as expendable material.

The witness then further testified:

My position as general foreman was the last I occupied immediately prior to being transferred to Assistant Superintendent of Air Craft shops. At the time of my transfer I had tools in my possession from both the supply and from the tool rooms for use on the field and not at home. At the time I was made Superintendent, I had thousands of dollars worth of equipment charged to me, some of which I attempted to explain that I brought from San Diego. There are in this box some I brought from San Diego. The torch [26] I have on this 1939 memorandum. I would say there were a thousand articles I had taken over from the man in plant maintenance, who died, which I had turned in and converted to other people who had army jobs and some of that material I still have on my memorandum and some of it I paid for lately. From 1942 until I was removed from my job on the Field I had succeeded in turning in a great

(Testimony of Clinton B. McElheny.)

amount of material and some I had transferred to the men who were using them. I drew thousands of tools, both expendable and charged to me and let at that time other mechanics use them. All of the tools, for instance, in plant maintenance were charged to me. Lathes, electric drills, electric concrete breakers, air concrete breakers. And when I became shop superintendent I had this box of tools plus a great many more which I had no place to put or store and it was more or less for us to find some place to put them so I took these tools and had them put in a box and that is how they came to be in that box. They were in my office. I paid for a lot of material which you will see we have a receipt for which was stolen from my office. This material was given to me for my use on the field and it was stolen from my office, so at that time I decided I had better do something about it, because they came through once in a while and cleaned the place up and I lost a lot of tools like that and paid for them. They were lost on the field by being cleaned up. It was my responsibility and I paid for them if I couldn't prove they were stolen or thrown away in the cleanup. I have memorandum receipts of credits back in June, 1941 and 1942 where I have continually tried to turn this material in and worked with Mr. Parker of the tool room to clean up my memorandums. From the start of the war until I was released by the Government, my average day was around fourteen hours a day.

(Testimony of Clinton B. McElheny.)

The Court then asked, "Well. We are interested in finding out why you took the tools to your house and kept them for such a long time. That is the issue". [27]

Whereupon the witness further testified:

As I say, there was some expendable material. That is, the foreman drew this material which was not charged to anybody and he distributed it out to other employees. So I gathered up this material and had it put in a box and this is the material I had at my home. At the time I put it in the box, I had no place to preserve it, understand. I took them home. There was more than this. They were expendable material which I had not distributed out to the men. I took them home in 1942 and after 1942 and until the F. B. I. came and took them away. I would say they were there a year and a half. In the meantime I had brought back quite a bit of this material. I had them stored in the house not knowing at the time when I would be able to clear up my memorandum. Some of them were actually charged to me. I had been sorting them out and had been making an honest effort from the time I was shop superintendent to clean this material up. I worked fourteen hours a day. Sometimes three shifts a day. I had to stay three shifts and had very little time to go over these tools. Some of these tools I paid for that were lost that are on my memorandum I didn't take home. However this stuff was at home. I have a tape that I carried in my pocket. I see that there. That

(Testimony of Clinton B. McElheny.)

was home two or three days or a week when they came to my place. I carried that tape all the time. Whenever I had a job to do that required the use of the tape I would take the tape home or it would be in my pocket. If I went out on a wreck to estimate the damage to the road or the field and I carried that tape. When I went to Placerville and estimated the damage done to the road there I carried that tape. Other stuff charged to me, wrenches, tools off the place. Have done so repeatedly and didn't think I was committing a crime. I have carried some four or five hundred dollars worth of diamonds. Industrial diamonds in my pocket. I had no place to keep them. I have the receipts there where I signed for them. I [28] brought them from the depot supply and issued them to Engine overhauling Section which they in turn gave me a receipt. But prior to the time I issued them I carried them in my pocket. I have one receipt for three hundred and some dollars of industrial diamonds I carried off the base.

At the time I was made Assistant Superintendent, Air Craft Shops, October 13, 1942, I was then placed in the engineering department under the Supervision of the General Superintendent of Air Craft Shops and supervised the work of eighteen general foremen, Air Craft Shops, thirty-seven Assistant General Foremen, Air Craft Shops and approximately fifty-five hundred Air Craft Shops employees. I had not had time to complete the entire turning in of all of these tools and equipment here

(Testimony of Clinton B. McElheny.)

in evidence before I was suspended from my position.

Some of the tools here in evidence were issued to me but not on my memorandum receipt. In order to get this type of tool under the "17 B class", we fill out a form 81, for the amount we need to supply the men working for us, or as near as we could come to it and they were brought to us from supply and we doled them out as we saw fit to the persons that needed them that used them. Lots of times we drew too much and lots of times we drew too little. Those were not charged to me.

Whereupon defendant's Counsel asked, "Now, when you were attempting to leave or were transferred from one position to another, what means were provided to get them out of your possession?"

To which Counsel for plaintiff objected as incompetent, irrelevant and immaterial, which objection the Court sustained.

There are a lot of tools in this box that were drawn on Form 81. The drills, the files, the smaller reamers, the smaller drills and if you took them to the store room now——

On motion of Counsel for plaintiff the Court struck out the phrase, "If you took them to the store room now". [29]

Sometimes we took some of these tools to the store room or tool room and attempted to get them back into the possession of the Field, which statement was by the Court stricken out on motion of counsel for plaintiff.

(Testimony of Clinton B. McElheny.)

I did take some of them back to the store room and sometimes they would accept some and others they wouldn't, depending on the store keeper. Some of these small items are expendable. Such as those on Form 81 on which you draw files, small drills, wire brushes, small reamers; that is drills up to quarter inch; over that they are accountable and are on your memorandum. You draw on this Form 81 and expend them yourselves as foreman. That is how come I have so many of them of various sizes. I drew these tools. Maybe some of them three or four years ago and they have been in my possession at the field and at home as I said. I have drawn on Form 81 as many as thirty-five or thirty-six or three or four dozen sets of small drills up to quarter inch; India sharpening stones and such equipment which is doled out to the various men I had working for me. When I was foreman of the fuselage department it was common for me to draw at least two dozen of India sharpening stones and those stones were doled out. And files the same; small drills. In this box of tools there are undoubtedly some of those that have been left over, the residue—in the fuselage department, for instance. I had some 150 men. I would not be surprised that at times I had drawn 150 of one of those types of files and doled them out. I know for a fact I have drawn fifty of one type of file we have there and doled them out. And in the course of drawing these tools over say four years or five this is a collection of them in which some of it in

(Testimony of Clinton B. McElheny.)

the last few months or the last year they began to issue tool kits on a standard memorandum receipt, and some of these were included—some of which were included on the memorandum receipt. When I got the last memorandum receipt I believe I had—I don't know whether I [30] have it with me or not—I have a complete list of expendable material charged on my memorandum receipt. It is a new system set up to charge each man with the expendable items. Expendable and nonrecoverable is a phrase used in the Army and are those and consist of those small things stated. I have drawn thousands of dollars worth of expendable and nonrecoverable material and with no intention of theft I took them home. I was cleaning up my memorandum receipts and that is why they remained home for more than a year. I have credits way back in 1942, where I gradually cleaned them up. Every opportunity I had I cleaned up my memorandum receipts. I had some fifteen or twenty of them. After I was removed from my job I had tools turned in to the store room. There are some now on my memorandum receipts that I myself don't know where they are.

The Court observed, referring to the indictment, that there was a whole page of drills, and the witness continued his testimony.

Yes. Quite a few of miscellaneous drills of the old carbon type. At the suggestion of the Court that there were eighty-seven drills, the witness further testified, they were all small drills. Some of

(Testimony of Clinton B. McElheny.)

them I had only a short time and some I had a whole year at home. As I cleaned up my desk, I will say in August, 1943, I found some more material that was actually my responsibility, had no place to put it, I found it in my desk in plant maintenance. I had Mr. Lane put them in a box and bring them to my office. I in turn took them home and stored them. I did not take it with any intention of stealing. I tried to explain to the Court a while ago that I had been working hard, long hours and succeeded finally in cutting down my memorandum to a very few items and some of that is expendable material. I have credit memorandums to show I have been actually cleaning up my memorandums. Some of the expendable material I had at home I brought back. I had three [31] flashlights during the blackout that were issued, nonrecoverable. We have had some thirteen hundred of them and I returned mine to the post the 1st of November when I started cleaning up my stuff. I was just getting to this material. I have always cooperated with our so-called intelligence department while I was superintendent of the shops. I have not succeeded in cleaning up all my memorandums involving the particular tools in evidence. There are other and additional matters I have cleared up. Some of this material here is what is called expendable and nonrecoverable. They are the small drills, files, Indian stones and such. When they are used up they are junked. That particular drill pointed out to me is one of the type that is expendable and non-

(Testimony of Clinton B. McElheny.)

recoverable. The 5 x B Reamer is not. It is on my memorandum and I am required to account for it.

That oxygen gauge is one of several I bought at a junk yard. I had no bill of sale. I turned it over to Mr. Chandler as he suspected it was Government property along with some of my dies and collets which he also took with him. I bought that and some half dozen more of them from Solomon's Junk Yard on Atlantic Boulevard and brought them to Sacramento with me. They were of a type formerly used at the Field but now obsolete and have been since about 1937. All the quarter-28 are my personal die collets (Witness picks out of the collection 7 dies and collets). There is no way of determining from an inspection of those small drills which were issued to me from the Field or given to me or handed out to me as expendable and non-recoverable. There is no way to pick out from those drills those which are mine. Some I have had from sixteen to eighteen years and some from my previous employment in the boat shop, up to 5/16 and 1/2 inch. I cannot identify the difference between them.

Defendant's counsel then offered to examine the witness on a partially mimeographed and partially typewritten letter of the [32] Sacramento Air Service Command, McClellan Field, dated January 4, 1944, which defendant testified he received through the mail and offered to show that it was

(Testimony of Clinton B. McElheny.)

a demand from McClellan Field in the sum of \$61.24 to cover the cost of lost tools.

Counsel for the Government objected on the ground it was incompetent, irrelevant and immaterial, which objection was sustained by the Court.

Defendant's Counsel offered in evidence Memorandum receipt issued by the War Department Air Corps, Sacramento Air Depot, Depot Supply, to Clinton McElheny, consisting of three pages dated September 27, 1939, containing tools identified by witness as being in evidence here for the purpose of showing that the tools and equipment were regularly issued to him; that he was charged for them and that they came lawfully into his possession.

Whereupon Counsel for plaintiff objected on the grounds they were incompetent, irrelevant and immaterial, not bearing on the guilt or innocence of the defendant and that no foundation had been laid, which objection was sustained by the Court.

Whereupon Counsel for defendant offered in evidence, Memorandum receipt in the same form to Clinton B. McElheny, No. 42-293, dated January 7, 1942, issued by Sacramento Air Depot, for the same purpose and on the same basis, which was objected to by counsel for the plaintiff on the ground that no proper foundation had been laid and was incompetent, irrelevant and immaterial, which objection was sustained by the Court.

Counsel for defendant then offered in evidence Memorandum receipt in the same form, issued to

(Testimony of Clinton B. McElheny.)

Clinton B. McElheny, No. 42-3529, dated August 20, 1942, consisting of one page, for the same purpose and upon the same basis, to which counsel for plaintiff objected on the grounds no proper foundation had been laid; that it was incompetent and immaterial and had no bearing on the guilt or innocence of the defendant, which objection was sustained *by* [33]

Counsel for defendant then offered in evidence Memorandum receipt issued to Clinton B. McElheny No. 42-32912, account No. 561, dated June 2, 1942, consisting of four pages, to which Counsel for the Government proposed the same objection and which was sustained by the Court.

Counsel for defendant then offered in evidence Memorandum Receipt No. 42-9620 dated November 12, 1942, Account No. 561, to Clinton B. McElheny *was* was objected to by counsel for plaintiff on the same grounds and which objection was sustained by the Court.

Counsel for defendant then offered in evidence, Memorandum receipt No. 42-32352 dated June 5, 1942, from McClellan Field to Clinton B. McElheny, which was objected to by Counsel for plaintiff on the same grounds, which objection was sustained by the court.

Counsel for defendant offered in evidence Memorandum receipt No. 43-18347, dated May 7, 1943, Account No. 561, from McClellan Field to Clinton B. McElheny, to which counsel for plaintiff objected

(Testimony of Clinton B. McElheny.)

on the same grounds and which objection was sustained by the Court.

Counsel for defendant offered in evidence Memorandum receipt No. 43-9620, dated November 12, 1942, Account No. 561, issued by McClellan Field to Clinton B. McElheny consisting of one sheet, which was objected to by Counsel for plaintiff on the ground no foundation was laid and was incompetent, irrelevant and immaterial, which objection was sustained by the Court.

Counsel for defendant offered in evidence Memorandum receipt No. 44-15, November 23, 1943, from McClellan Field, to Clinton B. McElheny, which was objected to on the ground, no proper foundation, no bearing on the guilt or innocence of the defendant, which objection was sustained by the Court.

Counsel for defendant offered in evidence, Memorandum receipt No. 44-3909, Account E-M-7753, dated November 29, 1943, McClellan Field to Clinton B. McElheny, which was objected to on the same [34] grounds.

Counsel for defendant then offered in evidence, Memorandum receipt No. 44-68, Account No. E-M-3753 (5a), dated July 1, 1943, McClellan Field to Clinton B. McElheny, which was objected to by counsel for plaintiff on the ground, no proper foundation was laid, no bearing on the guilt or innocence of the defendant, incompetent, irrelevant and immaterial, which objection was sustained by the Court.

(Testimony of Clinton B. McElheny.)

Counsel for defendant offered in evidence Memorandum receipt No. 43-6431, dated September 26, 1943, McClellan Field to Clinton B. McElheny, which was objected to by counsel for plaintiff on the ground no proper foundation was laid, was incompetent, irrelevant and immaterial, which objection was sustained by the Court.

Counsel for defendant offered in evidence Memorandum receipt No. 43-6564, dated September 26, 1942, McClellan Field to Clinton B. McElheny, which was objected to by counsel for plaintiff on the ground no proper foundation laid, no bearing on the guilt or innocence of the defendant, which objection was sustained by the Court.

Counsel for defendant offered in evidence duplicate receipt No. E N-3753, Voucher 1-12-44, issued to defendant for list of tools in the sum of \$52.92, which was objected to by counsel for plaintiff on the ground it was incompetent, irrelevant and immaterial and outside the evidence in the case, which objection was sustained by the Court.

The testimony of defendant in support of the offer was as follows:

I received that receipt from the tool section of McClellan Field when I paid for my lost tools. Before I could get my final check I had to pay for my tools. I do not remember when that was. It would be either December, 1943 or January, 1944.

Whereupon the witness further testified: [35]

I did not at any time take any of the tools intro-

(Testimony of Clinton B. McElheny.)

duced in evidence here and claimed by the United States or McClellan Field with the idea or the intent of converting them to my own use.

I did not at any time ever claim to be the owner of any of them other than those which I had paid for under my memorandum, to which counsel for plaintiff objected on the ground it was incompetent, irrelevant and immaterial, which objection was sustained by the Court.

I did not ever claim ownership of any of the tools here at any time up to the present date other than those collets which I picked out as my own private property. I had told these investigators prior to November 23, 1943, that I had taken tools home. I would say it was in the latter part of August or the first part of October, 1943. They had apprehended some person who had taken some material and called me up as Shop Superintendent to see if I would complain against the man or issue some complaint. They asked me what I was going to do.

I told them the only thing I could *so* as Shop Superintendent was to discharge the man, which I would do on their evidence, to which counsel for plaintiff objected and asked that the answer be stricken as having nothing to do with this case whatsoever, which objection was sustained by the Court.

Whereupon defendant continued:

I told them at that time I had tools I had taken home. Present at that time were Mr. Cecchetti, Captain Ark, Mr. Chandler a part of the time and

(Testimony of Clinton B. McElheny.)

Captain Kenny. I told them I had some of my tools at home and told them the circumstances surrounding the reasons why I had taken them home and that I was endeavoring to bring them back and turn them in, which I testified yesterday that I did and have been doing. At that time they did not do anything about it. However, they asked me as I said, to complain against these individuals which I could not do and if it would not be a [36] good idea to make an example of people who had taken material. I told them I didn't know. I wasn't well enough versed in that thing. However, I was doing my best to clean up my memorandums and would continue to do so. I was before the group mentioned in Plaintiff's Exhibit 10, the day before that statement was signed by me. They called me at night, I had worked until about 7 o'clock and asked me if I would come up to see them. I did that and Mr. Chandler then went with me to my place to see what tools I had. They said I should go to my place and return these tools with Mr. Chandler, which I had at home. They kept me there more or less questioning me after that—we got back about 11 o'clock I believe, or 12—until about 2 o'clock in the morning. They said they didn't believe me that this was the extent of the tools I had. That they expected to find a great many more machinery, heavy equipment and indications that I had gotten rid of a lot of machinery and tools. However, I did my best to assure them that I hadn't. They would come in and

(Testimony of Clinton B. McElheny.)

talk to me and they would go out. It was a sort of hodge-podge system of interviewing. One would talk to me and go away and leave me and give me no indication to go home. So I got home that morning about, I would say 2:30 or 3:00 o'clock and I appeared that morning at my work at 7:00 o'clock, the regular starting time. At about a quarter to eight, while at work in my office on test block equipment with the United States Engineer, Mark Falk and his assistants, this man Chandler appeared at my office and I asked him to wait until I had completed this job. I left my office at about 11:00 o'clock with Mr. Chandler and again went out to my place to see if we had missed anything, which he thought was Government equipment in the dark. We had gone there the night before. We found some other equipment that was scattered around. My tools had been moved. The roof blew off the shed or barn referred to and I had my boy move some of that stuff—some of that stuff that was left there [37] in the barn. Then we again returned to the Field some time after 12:00 o'clock. I went to lunch with Mr. Chandler and we came back to the Intelligence Office where this statement was written. Lieutenant Ark again accused me of having various equipment. Said I wasn't telling the truth. I didn't seem to be able to help him because I was telling the truth as I knew it. That went on again for a matter of two or three hours. Then they left me alone for some time. Then they called in a Captain Robert Pierce, who represented himself to be the

(Testimony of Clinton B. McElheny.)

Summary Court Martial Officer, representing the Commanding Officer, who said he wanted to take testimony or something of that sort and read me the Articles of War. I believe it was 80. He was a very nervous person and I didn't get a whole lot out of what he was driving at. He was terribly nervous. Appeared agitated. That would be the 24th day of November. It was the day after I signed Plaintiff's Exhibit 10 and that would make this meeting November 25th. Captain Pierce questioned me as to whether I had a bank account, whether I had taken any equipment, whether I knew certain people, whether I knew their business methods, whether I knew that the Government should not buy from a vendor but from a contractor and said that I bought materials from vendors. I said I did not buy material; that I recommended the purchase of material. I can be specific in this case if you wish.

I denied that I had purchased equipment from vendors because my own responsibility was a recommendation of equipment to be purchased, to which counsel for plaintiff objected as incompetent, irrelevant and immaterial and no bearing on the guilt or innocence of defendant, which objection was sustained by the Court.

Defendant further testified:

Preliminary to taking of any statement by Lieutenant Ark on November 24, 1943, he told me they had evidence that I had taken a lot of equipment from the Field and that they intended to prove [38] it and that I had not been cooperative with them and

(Testimony of Clinton B. McElheny.)

read me the Articles from a book. I am not an attorney. I am a mechanic. I was never arrested or prosecuted for any felony at any time in my life. I was arrested on traffic charges and I think I have one ticket for violation of a Motor Boat Act, fire extinguisher violation. Neither Lieutenant Ark nor anyone else advised me at any period of that proceeding or hearing that I was entitled to counsel and did not mention the fact I should have a lawyer and did not mention the word "lawyer."

I was taken to this meeting by Mr. Chandler. I was in his custody all the time. He practically lived with me during that time.

Which words, "he was in his custody" were objected to by Counsel for plaintiff as calling for a conclusion of law, which words the Court struck out on motion of counsel for plaintiff.

Defendant further testified:

I was with Mr. Chandler all of the time and he never left me far out of his sight. He went to my home with me and came back from my home with me. He went up to the hearing on November 24th with me and went with me before Captain Pierce on the following day, November 25th, and was in the room.

Cross Examination

I recall the 21st day of November, 1943, and do not remember disposing of some United States Government property on that day. I threw some junk down a well. I admitted it to the investigators and listed it for Mr. Mochle. That was not United

(Testimony of Clinton B. McElheny.)

States Government property. I wouldn't say that it came from the Air Field. Some might have come at some time, but I wouldn't be able to identify it as Government's material. I said some of it did come from McClellan Field. I threw some junk down a dug well. I was cleaning up my tools. I was told to clean them up prior to this and was cleaning out my back porch. There were two paint cans, [39] pieces of stove pipe, some old shoes, some old files, some pieces of copper tubing, some bottles, some old pieces of oxygen gauges, parts of oxygen gauges that you saw here yesterday and more or less junk material. It is my practice when I clean up around, that I take that junk down there and throw it down the well. I have been putting stuff in that well since I had the property. Material I had there wasn't returnable. If it was returnable I would have had to pay for it. I couldn't say for sure whether any of it was taken from the Field. There might have been some that came from the Field like the small files, or it may not have been government property. The oxygen gauges I had had for 10 years. Worn parts of oxygen gauges. I made no secret to anybody that I had disposed of that material, as set forth. They didn't find it in the well. I did not say that was United States Government property in the well and did not say it came from McClellan Field. I told Mr. Moehle it may have, some of it. The copper tubing may have. I had some of this government property at my home for a year or longer than a year, a year and a half. I said

(Testimony of Clinton B. McElheny.)

I was cleaning up my memorandums and returned a lot of material over a period of years. I had also cleaned up a lot of some other tools as shown by my credits. I had so much material I was returning that it took me a year and a half to return it and still have this much left. I didn't have a warehouse full at home but I had a warehouse full at the Field. These articles were at my home. This is the last material or practically the last material charged to me that I had access to. From time to time when I got time I got hold of Mr. Parker of the tool room or Mr. Tormeu of the Plant Maintenance who handled some of my Memorandum receipts for me and had them clean up tools for me. I gathered tools up and turned them in at the Field. I have to go through the records and sort them out and see what is expendable; otherwise I would have to pay for them if they are not cleared up. In over a year and a half [40] I didn't have time to return these tools and that statement is partially right. I drove out to the Field every day and sometimes three times a day. I did not have room at McClellan Field to store these tools and so took them home. I had charge of the whole maintenance division covering some 15 or 20 acres. There wasn't room there to store these few tools where they would be safe.

Whereupon Counsel for the plaintiff asked the witness:

"In other words, all the rest of the tools, the bomb sights and whatnot at McClellan Field are not safe,

(Testimony of Clinton B. McElheny.)

so to keep these tools safe you had to take them from McClellan Field to your home and put them in a trailer house and a garage and a barn. Is that your testimony?"

The Witness:

"May I refuse to answer that question?"

The Court:

"Answer the question."

The Witness:

"I can't, sir, because he put the question about bomb sights would not be safe. I cannot answer that."

Whereupon counsel for plaintiff asked the witness:

"With all the tools and the other equipment out at McClellan Field, some millions of dollars worth of equipment, you got so worried about these particular tools that you decided to take them from McClellan Field to your home so they would be safe, is that your testimony?"

To which counsel for defendant objected on the ground it was improper cross examination, assuming facts not in evidence, as defendant had said nothing about being worried about tools, which objection was overruled by the Court.

Defendant further testified:

I took them home because I had no place to keep them except [41] in my office. I lost stuff at my office and had to pay for it. I bought them home for two reasons: So I could segregate them

(Testimony of Clinton B. McElheny.)

and return them and clear my memorandums, which I was doing, and where they would be under my own protection. I was Superintendent of the Maintenance Department and had 15 acres and many buildings thereon under my partial control and there were guards around the premises. I did not testify that I returned some of these tools; that I returned some of these tools and then brought them back to my home again. I said my memorandums were gowed up so that I didn't know what was charged to me. I could not say whether I did or did not try to turn in that particular wrench to the tool room. I did return some as evidenced by my credits. I believe I did try to turn in some of the articles that are in evidence here. I can't recall the particular ones. I can't say that truthfully because I did not take them back to the plant to return them until I found where they were charged to me so I could get credit for them. Otherwise I would have to pay for them.

I understand that expendable doesn't mean I can put a drill in my pocket or take it home and sell it. An expendable item is one you are not accountable for unless it is on your Memorandum receipt.

They don't issue material as expendable to take personally to your own home or to sell to somebody in the street. It is still property of the United States Government to be used only in the work. I called the attention of Mr. Moehle, the F. B. I. Agent, to a mistake in his list of tools and the type

(Testimony of Clinton B. McElheny.)

of torch that I am charged with; that my Memorandum was wrong. At that time I did not know and had not given any thought as to what was in the box and what we did pick up. I told Mr. Chandler at the time we picked up those tools I had no bill of sale for them but maybe some of them were mine. I may have mentioned that to Mr. Moehle the F.B.I. Agent: I am not sure. I had quite a lengthy conversation- [42] tion with him. I signed the statement you have exhibited to me on both pages. I read it. At the time that statement was taken I learned I shouldn't have had the tools in my possession and I was violating a federal law because I was told by Captain Ark that I had violated the law and I was told again by Mr. Moehle.

The other men at the Field were provided with places to lock their tools up. I had no place to keep my tools but in my office. I could not have a place to lock up my tools. I had some tools as late as November the 23rd and 24th in 1943 that were in the stock room in Plant Maintenance which were on my Memorandum receipts, being issued out to men that I was directly responsible for and would have had to pay for had they been lost. They were in the plant maintenance stock room, being issued to them. The four items you are showing me were part of the tools that I had been returning and which I admitted I took from the Field and took them home. I can't identify them as United States Government property. You will find "U. S. A." on all kinds of tools. I wouldn't say whether they were

(Testimony of Clinton B. McElheny.)

Government tools or not. If they came from my home and they had "U. S." on them I would not say they were Government tools. I wouldn't identify those wrenches that have "U. S. A." engraved on them as Government tools. Although I told the government agents they were government tools and I took them to my home. Although I took them from McClellan Field I still say I don't know whether they are Government tools.

Redirect Examination

Defendant testified on Redirect Examination as follows:

I have had Plaintiff's Exhibit No. 6, a steel tape, 50 feet, stamped "Air Corps, U. S. Army" in my possession for about a year. I drew it on an OMAR Ticket. I use that almost daily in my work. I carried it to and from the Field on my person and did not at any time claim to be the owner of it. I used the tape pretty near every day when I had occasion to do any measuring or estimating. [43] I recollect along about the 18th or 19th of November, Mr. Burroughs and myself and the United States Engineer used this tape to measure the test block area where we intended to put the test blocks. I carried it in my pocket instead of turning it back at the end of every day's work and getting it reissued to me the following day, I just continued to use it. It was in my possession at the time Mr. Chandler and the other gentlemen asked me about the tools and at that time I admitted having it in my possession.

(Testimony of Clinton B. McElheny.)

Recross Examination

I had the tape in my overcoat pocket at home the day the Agents went out there.

THOMAS E. DUDLEY

called as a witness for defendant, being duly sworn, testified as follows:

I reside at 2920-Q Street, Sacramento, California, and was employed at McClellan Field until October 23rd. I was assistant to the supervisor of tools and methods. They had what they call similar to a tool and method department, using the minds of all the men at the depot on ideas and ways on how to do things faster and better. My work carried me all over the depot. We designed tools, rebuilt tools, made fixtures, built buildings, tore them down and moved machinery. At that time I had contact with the issuance of tools from the tool room and from the department they call Supply. Tools were issued to me for use in my work.

Q. Were you ever given any permit or anything of that kind to take tools from the Field?

A. Yes.

To which Counsel for plaintiff objected on the ground it was incompetent, irrelevant and immaterial, which objection was by the Court sustained and then moved that the answer be stricken, which motion was granted by the Court.

(Testimony of Thomas E. Dudley.)

I recognize the document handed me and I have had many of those issued to me. I am the T. E. Dudley named in the paper. [44]

Whereupon counsel for defendant offered in evidence Permit dated July 14, 1943, issued to T. E. Dudley by D. H. Searle, Captain, Air Corps, Engine Repair Officer, Headquarters Sacramento Air Service Command, McClellan Field, California, which was objected to by Counsel for plaintiff on the ground it was incompetent, irrelevant and immaterial.

Whereupon Counsel for defendant stated he was trying to prove the system in vogue at the Field under which tools came lawfully into the possession of Mr McElheny, to show the system that is used at the Field.

The objection of Counsel for plaintiff was thereupon sustained by the Court.

Counsel for defendant then offered the document for identification to be marked Defendant's Exhibit "K", which was as follows:

"Defdt's "K" for Identification.

SASCMD5—5

8 October 1943.

To Whom It May Concern:

i. Mr. T. E. Dudley is to be permitted to carry the following to and from his work at this Depot.

1 Set Drawing Instruments.

1 Machinery Hand Book.

1 Triangle.

1 12" ruler, 1 steel.

(Testimony of Thomas E. Dudley.)

2. He is also permitted to carry partly finished drawings of tools to and from the field. This pass will terminate 1 December 1943.

For: R. G. JAMES,
Captain, Air Corps,
Engine Repair Officer."

Witness further testified that expendable tools are tools that are put on a memorandum receipt. For instance, if we [45] are short of tools or anything is needed, there are a great many items out there that the superintendents, or foreman or leaders can draw and then they are put out on the line or to the mechanics or whatever places they are in and they are not charged to anybody. When they are worn out they are thrown away. Expendable tools covers every phase. Everybody uses them. Army officers use expendable tools. Laboratories use them. Everybody. There are certain classes of expendable tools that cover, I would say, every operation in the whole depot. When they are used that way thereafter there is no one called upon to account for them or to return them.

To which counsel for plaintiff objected on the ground that defendant had testified what expendable is. Which objection was sustained by the Court.

Counsel for defendant then explained to the Court that the defendant had testified that anything over a quarter inch drill on down, comprising 50 or 60 of them in evidence were expendable and as the

(Testimony of Thomas E. Dudley.)

present witness testified they are thrown away so that they are no longer property and the defendant would like to prove that fact by this witness who was a designer of tools and equipment on the Field, which offer the Court denied.

Whereupon, counsel for defendant asked the witness if he knew of his own knowledge whether tools from the Field could be taken home by workmen by authority of the officers in charge of the Field and used at home. To which Counsel for plaintiff objected on the ground it was incompetent, irrelevant, no bearing on the guilt or innocence of the defendant, which objection was by the Court sustained.

Whereupon counsel for defendant asked the witness if he knew whether the tool room at McClellan Field finally posted notices to the effect that tools borrowed for home use were to be returned, to which counsel for plaintiff objected on the ground it was [46] incompetent, irrelevant and immaterial and had no bearing on the case, which objection was by the Court sustained.

Counsel for defendant then asked the witness if he knew whether tools removed from place to place on the field, that is tools charged out to employees, were moved and transferred without the knowledge and consent of the employee. To which the witness answered, "Yes".

Whereupon counsel for plaintiff moved that the answer be stricken and he objected on the ground

(Testimony of Thomas E. Dudley.)

it was incompetent, irrelevant and immaterial and had no bearing on the guilt or innocence of the defendant, which objection was sustained by the Court.

Whereupon Counsel for defendant asked the witness if he knew whether tools and equipment on the field of usable character were thrown into the junk pile or into the fire pit where anyone could take them if they wanted them, to which counsel for plaintiff objected on the ground it was incompetent, irrelevant and immaterial and had no bearing on the guilt or innocence of the defendant, which objection was sustained by the Court.

Whereupon Counsel for defendant asked the witness if he knew of his own knowledge whether any employee prior to August, 1943, could obtain a pass from the authorities to take any of that material or tools from the junk pile or fire pit, and take it off the field, which was objected to by counsel for plaintiff as incompetent, irrelevant and immaterial, had no bearing on the guilt or innocence of the defendant and that all such questions were obviously out of order, which objection was by the Court sustained.

Whereupon Counsel for defendant stated he wished to prove by this witness, the system that the defendant had to operate under and to explain why these tools came into his possession as corroborative of defendant's testimony that as a matter of fact he had to take the things off the field

(Testimony of Thomas E. Dudley.)

because he could not clear up [47] his memorandums and get them back into the field.

Whereupon the Court stated, "The Court has ruled".

Whereupon Counsel for defendant made the following statements and the Court made the following ruling:

"May I be permitted to prove by this witness that this—particularly these drills and the reamers and so forth—that smaller tools are issued and charged to a foreman; if they are broken by a workman that the workman—one workman can turn in the bit and another turn in the shank and they get two drills. The foreman is charged with one drill. Well, when he tries to clean up and get his equipment cleaned up he can't turn back but one, and he has normally on his hands—and he has to go through an immense amount of red tape to get the tools out of his possession, and that in case of being shifted from one position to another that he could not do other than what he did, pick them up and take them home until such time as he could unravel his memorandum receipts and get them back into the possession of the Government. The system itself, that is what I am going to have this witness testify to, and he is the best man to do it because he is not only in and around the tool room but he is all over the field, he has designed tools, sees that they are made, and so forth.

The Court: The Court has ruled.

(Testimony of Thomas E. Dudley.)

Mr. Gilmore: May I be permitted to prove by this witness that when there is a change of any type of tools or equipment at the field then the former tools and equipment are condemned by those in command and they are ordered thrown on the junk pile, sold to dealers in Sacramento and elsewhere or ordered burned up and thrown in the fire pit.

The Court: The Court has ruled already, Mr. Gilmore."

Rebuttal

ARTHUR CHANDLER,

witness for plaintiff, recalled in rebuttal, [48] testified as follows:

I had a conversation with the defendant in regard to what he threw down the well, at the Intelligence Office at McClellan Field at which were present Andrew Cecchetti, Captain Ark and myself. He said he had thrown Government property, government tools and equipment down the well.

Cross Examination

He just mentioned he boxed up a box of tools and threw them down the well and then took him over to the well and I had a powerful flashlight and I could see some of those tools down there, oxygen regulators and files. Mr. McElheny told me and he stated to the intelligence officer that he be-

(Testimony of Arthur Chandler.)

came frantic and scared. That was the reason for throwing Government property down the well. The well is in such a condition it is impossible for a human being to go down there because of gas condition, it is an old dug well and can cave in at any time. We didn't feel safe to send anybody in there. It is not cased in and is in loose dirt, and with that well over eighty feet deep we weren't sending anyone down there to get the government property. It's a long way down there to determine the exact nature, but you could see they were parts of oxygen regulators and Mr. McElheny told me they were oxygen regulators. I would say they were the same size as that you have exhibited to me, because I could see very plainly the size. I cannot say whether they were in use at McClellan Field at that time or not. He made the statement at several different times, both out at the well and at the Intelligence Office. I heard the statement on the 23rd day of November and I heard the same statement on the 24th day of November.

Whereupon both plaintiff and defendant rested their respective cases.

The foregoing was all the evidence offered, heard or admitted by either side in this case. [49]

Whereupon the Court orally announced in open Court that:

"I find the defendant guilty on the First Count of the Indictment and not guilty as to the Second, Third, Fourth, Fifth and Sixth Counts."

Whereupon Counsel for defendant moved for a dismissal of the Second, Third, Fourth, Fifth and Sixth Counts of the Indictment, which motion was then and there granted by the Court, and said Second, Third, Fourth, Fifth and Sixth Counts were dismissed.

Whereupon counsel for defendant immediately filed written Motion for a New Trial as follows, to-wit:

[Title of Court and Cause.]

Comes now the defendant, Clinton B. McElheny, and files this as and for his Motion to the Court to grant him a new trial in the above entitled action under the indictment heretofore presented to this Court by the Grand Jury and upon the following grounds of error occurring during the trial of said cause and objected or excepted to by the defendant.

That the grounds upon which this Motion is based are as follows:

I.

Error in law in denying defendant the right to prove that the tools described in said indictment came lawfully into his possession under the rules and regulations of the military authorities of McClellan Field who have exclusive jurisdiction over all persons employed on said Field and whose rules and regulations are supreme thereon.

II.

Error in law in denying defendant the right to prove that under said rules and regulations, the McClelland Field Command does actually issue and deliver to civilian employees tools and equipment on (a) memorandum receipts; (b) omar tickets and (c) as expendable items without receipts or tickets; and that such methods [50] so provided are the only means under which workmen and employees generally and this defendant could obtain tools and equipment with which to work.

III.

Error in law in denying defendant the right to prove that employees of McClellan Field were lawfully permitted under the rules and regulations of the army command at said Field to take from the Field to their respective homes, tools of the Field for private use.

IV.

Error in law in denying defendant the right to prove that employees of McClellan Field were lawfully allowed and permitted to take tools and equipment from said Field under a pass.

V.

Error in law in admitting alleged confessions of the defendant obtained under duress and while defendant was held in technical custody without warrant.

VI.

Error in law in refusing to consider or recognize the Articles of War and in particular Article II and Section 80 thereof.

VII.

Error in law in presuming from the mere fact of possession that each article named in the indictment was a matter of law stolen by this defendant.

VIII.

Error in law in allowing and permitting introduction of evidence in the first instance without identification and with no support other than alleged confessions of defendant.

IX.

Error in law in admitting evidence not identified as having been taken from McClellan Field and founded upon similarity alone.

This motion is made and based upon all the files, papers and [51] records on file in said action and upon all evidence and testimony introduced at the trial.

Dated: February 18, 1944.

CHAS. L. GILMORE,

Attorney for Defendant.

Whereupon the Court denied Motion for a New Trial.

Thereupon the Court immediately pronounced sentence upon defendant as follows, to-wit:

That the defendant, Clinton B. McElheny be imprisoned in the County Jail for the period of one year.

Whereupon defendant gave oral Notice of Appeal with the oral statement that written Notice of Appeal would be filed within five days.

Whereupon the defendant moved for admission to bail pending appeal, which motion was by the Court immediately denied.

Thereafter on the 8th day of March, 1944, and within the time allowed by the Rules of Criminal Procedure, the appellant, defendant below, duly tendered this his Bill of Exceptions herein, which having been seen and examined by the Court and Counsel for plaintiff, is by the Court allowed and approved by the Honorable Martin I. Welsh, the Judge of the United States District Court for the Northern District of California, Northern Division and the same is ordered by said Court to be filed as and for the Bill of Exceptions and made a part of the record herein, which is now accordingly done.

Given under the hand of the Judge of said Court before whom said proceedings were had this 17th day of March, 1944.

MARTIN I. WELSH,

Judge of the United States District Court for the Northern District of California, Northern Division. [52]

The above and foregoing Bill of Exceptions is hereby approved this . . . day of March, 1944.

FRANK J. HENNESSY,

United States Attorney,

By

Assistant United States At-
torney.

CHAS. L. GILMORE,

Attorney for Defendant.

[Endorsed]: Filed March 17, 1944. [53]

[Title of District Court and Cause.]

ORDER DIRECTING THAT PHYSICAL EX-
HIBITS BE TRANSMITTED TO APPEL-
LATE COURT

It appearing to the Court that the original physical exhibits admitted or offered in evidence in the above cause, should be inspected by the United States Circuit Court of Appeals, for the Ninth Circuit, as part of the record of the above named defendant on appeal in said cause;

It Is Ordered that the Clerk of this Court transmit to the Clerk of the United States Circuit Court of Appeals for the Ninth Circuit, at San Francisco, California, the original physical exhibits offered or received in evidence during the trial of the above entitled action.

Dated: March 17, 1944.

MARTIN I. WELSH,
Judge.

[Endorsed]: Filed March 17, 1944.

CERTIFICATE OF CLERK U. S. DISTRICT
COURT TO TRANSCRIPT ON APPEAL

I, C. W. Calbreath, Clerk of the United States District Court for the Northern District of California, do hereby certify that the foregoing 88 pages, numbered from 1 to 88, inclusive, contain a full, true and correct transcript of certain records and proceedings in the case of United States of America vs. Clinton B. McElheny, No. 8637, Cr., as the same now remain on file and of record in this office.

I further certify that the cost of preparing and certifying the foregoing transcript on appeal is the sum of Eighteen and 55/100 (\$18.55) Dollars, and that the same has been paid to me by the Attorney for the appellant herein.

In Witness Whereof, I have hereunto set my hand and affixed the seal of said District Court, this 22nd day of March, A. D. 1944.

[Seal] C. W. CALBREATH,
Clerk.

By F. M. LAMPERT
Deputy Clerk.

[Endorsed]: No. 10690. United States Circuit Court of Appeals for the Ninth Circuit. Clinton B. McElheny, Appellant, vs. United States of America, Appellee. Transcript of Record. Upon Appeal from the District Court of the United States for the Northern District of California, Northern Division.

Filed March 23, 1944.

PAUL P. O'BRIEN,

Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

In the United States Circuit Court of Appeals
for the Ninth Circuit

No. 10690

UNITED STATES OF AMERICA,

Plaintiff and Appellee,

vs.

CLINTON B. McELHENY,

Defendant and Appellant.

STATEMENT OF POINTS ON APPEAL
AND DESIGNATION OF RECORD

Notice is hereby given that Clinton B. McElheny, appellant in the above action, intends to rely on the Assignments of Error appearing in the transcript of record in the above cause, as his Points

on Appeal and hereby adopts such Assignments as such Points on Appeal, and that the entire transcript as certified by the Clerk of the District Court be printed as the record on appeal in said cause.

Dated: March 24, 1944.

CHAS. L. GILMORE,

Attorney for Defendant and
Appellant.

Due service by copy of the within Statement and Designation admitted this 24 day of March, 1944.

EMMET J. SEAWELL,

Asst. U. S. Attorney,
Attorney for Plaintiff and
Appellee.

[Endorsed]: Filed Mar. 25, 1944. Paul P.
O'Brien, Clerk.

No. 10,690

IN THE
United States Circuit Court of Appeals
For the Ninth Circuit

CLINTON B. McELHENY,

Appellant,

VS.

UNITED STATES OF AMERICA,

Appellee.

Upon Appeal from the District Court of the United States for the
Northern District of California, Northern Division.

BRIEF FOR APPELLANT.

CHAS. L. GILMORE,

Capital National Bank Building, Sacramento, California,

Attorney for Appellant.

FILED

MAY 11 1944

PAUL P. O'BRIEN,
CLERK

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No. 10,690

IN THE
United States Circuit Court of Appeals
For the Ninth Circuit

CLINTON B. McELHENY,

Appellant,

VS.

UNITED STATES OF AMERICA,

Appellee.

Upon Appeal from the District Court of the United States for the
Northern District of California, Northern Division.

BRIEF FOR APPELLANT.

THE COURT HAS JURISDICTION.

The United States of America is plaintiff, the indictment charges criminal offenses, and the judgment and sentence are final. This Court has jurisdiction of this appeal under 28 U.S.C.A. Sec. 225 and Rule III, Rules of Practice and Procedure after Verdict of Guilty.

STATEMENT OF PROCEEDINGS HAD.

Appellant, employed at McClellan Field near Sacramento, California, since June, 1939, and as Assistant

(Note): The letter "T" in parentheses followed by a number, refers to the page of the printed Transcript of Record.

Superintendent, Air Craft Shops, since October 13, 1942, was charged by indictment returned January 7, 1944 (T. 2) in Count One thereof, with having taken and carried away on or about January 1, 1942, with intent to steal or purloin the same, certain small tools therein described, and in Counts Two, Three, Four, Five and Six, with unlawfully having the same tools in his possession on or about November 24, 1943, with intent to convert the same to his own use and gain.

Appellant was arraigned January 12, 1944, pleaded Not Guilty on all Counts, waived a jury, and was tried to the Court, February 16 and 17, 1944.

The trial Court found him guilty on Count One, not guilty on Counts Two, Three, Four, Five and Six, dismissed them, denied Motion for New Trial and sentenced him to One Year in the County Jail.

Notice of Appeal was timely filed, Bill of Exceptions and Assignment of Errors were lodged with the trial Court March 8, 1944, and the Bill of Exceptions was settled and approved by the trial Court March 17, 1944.

STATEMENT OF THE CASE.

Appellant entered the employ of the U. S. Army Air Corps at Rockwell Field, near San Diego, March 1, 1929 (T. 62), and was transferred to McClellan Field in June, 1939. In transferring, he shipped and brought a lot of tools, some of which were his own, and some belonged to the Air Force.

(T. 64.) Some were charged to him on memorandums (T. 64), in accordance with the method used in these Fields and established by the U. S. Army. Some was expendable material which he had put in a box and had taken to his home when he was promoted to Assistant Superintendent for the reason he had no place to keep them (T. 71).

All these, except expendable material, were charged to him on memorandums issued by the tool room at the Field. He was working fourteen hours a day, had to stay on the job to meet three shifts and could not get his memorandums cleared (T. 71).

He carried tools to and from his work and it never occurred to him he was committing a crime in so doing (T. 72).

Much of the equipment, in fact all save ten pieces, itemized in the indictment could not be identified as property of the United States, yet was admitted in evidence over objections of appellant's counsel, as U. S. Exhibit 12 (T. 62). Some of this equipment was charged to defendant and he had paid the Field for it (T. 81). That may have been wrong, but it was the system established and enforced by the Air Corps.

Some belonged to the defendant personally (T. 77). He had those items in his possession from sixteen to eighteen years (T. 77). The drills and taps were standard tools not marked or identified as property of the United States (T. 46). Similar testimony as to the other tools was ruled out by the trial Court (T. 47).

A box of tools consisting of old type carbon drills, dies, collets, reamers and files admitted in evidence as U. S. Exhibit 12 (T. 62) over objection of appellant's counsel, were without any identifying marks and admitted on the statement of witness Park that he had never seen them on the Field and did not know as a fact, they came from McClellan Field (T. 51). The only identifying evidence or testimony offered by plaintiff was that they were similar to articles at McClellan Field (T. 51). The testimony and evidence as to the other exhibits of tools were the same.

For three days appellant was held in technical custody (T. 45, 85), although it developed at trial he was not actually under arrest. He was made to understand, however, that he was detained.

During this period he was hailed before what he was advised was a court martial proceeding, advised by a Lieutenant Ark that it was a court martial as shown by U. S. Exhibit 10 (T. 55), and also advised by a Captain Pearce (T. 85) who read the Articles of War to appellant. Out of this hybrid proceedings, which plaintiff endeavored to repudiate, a so-called confession (U. S. Exhibit 10) was obtained from appellant.

The second day of this restraint appellant took witness Chandler to appellant's home where the lot of tools set forth in the indictment was pointed out to Chandler. Appellant had, during the August previous, told the Intelligence officers at the Field he had some tools at home (T. 82) and was endeavor-

ing to clean up his memorandums. At no point is this statement denied or even challenged.

On the third day he was "invited" to come to the office of an F. B. I. Agent, Mr. Moehle (T. 57), where another "confession" was obtained (T. 58). This "confession" was admitted in evidence over objection of appellant's counsel as U. S. Exhibit 11 (T. 58), and without the list of articles, was read into the record.

Thereafter appellant was discharged from his employment on November 25, 1943 (T. 63).

Although the "confession" obtained at the pseudo-court martial shows some tools were taken from the Field by appellant on a pass, all testimony and evidence offered by defendant relating to a pass for tools was ruled out by the trial Court (T. 94).

ASSIGNMENTS OF ERROR Nos. 1, 2, 3, 4, 5, 6 AND 7.

The Court erred in admitting U. S. Exhibits Nos. 2, 3, 4, 5, 6, 7 and 8.

We have grouped these seven Assignments for the reason they refer to physical exhibits, the testimony referring to them being identical and came from the same witness.

These exhibits are respectively, 10-inch Wrench, Padlock, Machinist's Scriber, Pliers, Steel Tape, Wrench and Pliers.

No witness identified any of the exhibits as having been at McClellan Field; no witness ever saw them

at the Field, and no witness produced by the government could identify any of them as property of the United States as of January, 1942, or November, 1943, or as of any other time.

They were admitted on the sole ground they were similar to tools at the Field.

They were standard tools such as are used in any machinist's or mechanic's trade, purchasable anywhere, and by their very inherent nature actually are similar to McClellan Field tools exactly as they are similar to standard tools of the same form (T. 47). The padlock bore a number used a long time ago at the Field, but no longer used (T. 49). Other tools bore marks similar to the markings used at the Field (T. 50).

ASSIGNMENT OF ERROR No. 8.

The Court erred in admitting U. S. Exhibit No. 9, a miscellaneous lot of tools (T. 50).

This exhibit consisted of a lot of worn and rusted wrenches, files, and a hodge-podge of odds and ends such as is found around the home shop of any machinist. This lot was without any identifying marks whatever that could fix their place of origin as McClellan Field. They were admitted on the sole ground of similarity (T. 51). The only witness who made any pretense of identifying them stated he never saw them until the morning of the trial (T. 51).

ASSIGNMENT OF ERROR No. 9.

The Court erred in admitting U. S. Exhibit No. 10 (T. 54) over the objections of appellant, as follows:

1. It was hearsay evidence, did not contain all the evidence and statements obtained and made during the session of the Summary Court and was an extra-judicial confession obtained by trick and ruse and without any foundation having been laid for its introduction.

2. Its nature was highly prejudicial to the appellant.

This exhibit consisted of a purported "confession" by appellant taken at McClellan Field November 24, 1943.

The opening paragraph of this statement is ample to damn it as a confession obtained by trick artifice and fraud:

"I, Clinton B. McElheny, having been duly warned of my rights under the 24th Article of War and knowing that as a civilian employee of the War Department am fully subject to the processes of a military court or tribunal duly authorized to take oaths without any threats, coercion or promises of any immunity, do swear and affirm that the statement I am about to make is a true statement."

The jurat to the statement is further proof of appellant's claims:

"Sworn and subscribed before me this 24th day of November, 1943. Howard Ark, First Lieutenant, A.C., Summary Court Officer".

Civilian personnel of army camps are subject to Court Martial under Article II of Articles of War.

6 *C. J. S.*, 'Sec. 54 (C), p. 448.

Civilians on duty with armies in the field in time of war, include civilians serving in cantonments or training camps within or without the United States.

Hines v. Mikell, 259 Fed. 28, 170 C. C. A. 28.

That the whole proceeding under which this purported confession was obtained was one calculated by the army officers in charge, to impress appellant with the idea that he was actually being court martialled. The officers knew that they were endeavoring to trick and did trick the appellant.

The specifications of charges must be served on the accused within eight days after his arrest.

U. S. v. Smith, 197 U. S. 386, 49 L. Ed. 801, 25 Sup. Ct. 489.

The defendant must be informed of the charge against him in language sufficiently clear to inform the accused of the offense for which he is tried and to enable him to prepare his defense.

In re Stubbs (C. C. Wash.), 133 Fed. 1012.

The record must show the oath as having been administered to each member of the Court before commencement of the trial.

3 Op. Atty. Gen. 397, 544.

There are no presumptions in favor of regularity of courts martial.

Runkle v. U. S., 122 U. S. 543, 30 Law. Ed. 1167, 7 Sup. Ct. 1141.

There is no trial at court martial until the reviewing and confirming authority has taken final action on the case.

10 U. S. C. A., Secs. 1517-1519;

In re Bogart (C. C. Cal.), 3 Fed. Cas. No. 1596,
2 Sawy. 396.

If any one of the statutory requirements is not followed by the court martial, the whole proceeding is void.

McClaghry v. Deming, 186 U. S. 49, 46 Law.
Ed. 1049, 22 Sup. Ct. 786.

ASSIGNMENT OF ERROR No. 10.

The Court erred in admitting U. S. Exhibit No. 11 (T. 58).

This is another "confession" obtained by an F. B. I. agent from the appellant on November 29, 1943, five days after the pseudo court martial.

This statement was admitted over the objections of Counsel for appellant on the grounds:

1. That it was and is incompetent to prove any of the issues of this case.

2. That it was and is hearsay.

3. That it is in form an extrajudicial statement for which no foundation had been laid.

4. That it was highly prejudicial to defendant.

As we have shown under Assignment of Error No. 9 the appellant was first subjected to a so-called court

martial on November 24. On November 29, U. S. Exhibit No. 11 was elicited from the appellant by an F. B. I. agent.

Appellant was not under arrest at any time although he was advised and informed that he was. He had no way of determining whether he was still subject to the court martial proceedings when he was "invited" to go to the F. B. I. office. He had been under very close surveillance November 23rd, 24th and 25th and so far as we can glean from the record had been closely questioned between the 25th and 29th. At least the F. B. I. agent had to approach appellant some time between those days in order to extend the "invitation" for the visit.

The officers of the Federal Bureau of Investigation are authorized to make arrests and the Statute requires that "The person arrested shall be immediately taken before a committing officer".

5 U. S. C. A., 300a.

The laws of the State of California provide that when an arrest is made without a warrant by a peace officer or private person, the person must without unnecessary delay be taken before a magistrate.

California Penal Code, Section 849.

If the arrest is made, he must be taken before the magistrate within two days.

California Penal Code, Section 825.

A confession obtained under duress by an F. B. I. agent without an arrest of the accused is sufficient

ground of and in itself for reversal of the judgment and verdict.

McNabb v. United States, 318 U. S. 332, 342, 63 Sup. Ct. 608, 613;

Anderson v. United States, 318 U. S. 350, 355, 63 Sup. Ct. 599, 601.

A confession obtained under similar circumstances after five days of interrogations and admitted in evidence has been sufficient cause for reversal.

Chambers v. State of Florida, 309 U. S. 227, 239, 60 Sup. Ct. 472, 478.

This is not a new rule. It has long been the protecting arm established by the Constitution.

Naftzger v. United States, 118 C. C. A. 598, 200 Fed. 494, 498.

Where confessions appear to have been made to persons in authority, the burden is upon the prosecution to prove that they were voluntary.

1 *Wharton Crim. Ev.*, Sec. 206, p. 226;

Johnstone v. United States, 1 Fed. (2d) 928.

ASSIGNMENT OF ERROR No. 11.

The Court erred in admitting U. S. Exhibit No. 12 (T. 62), a box of tools. Objections to its admission were timely made on the grounds:

1. There was no identification of any of the tools as having ever been at McClellan Field or had ever been owned by or in possession of the United States and no evidence independent of the extrajudicial con-

fessions of defendant connecting the appellant with any of the tools in such exhibit.

2. They were admitted solely on the ground they were similar to tools at McClellan Field and therefore the Court indulged in a presumption of guilt as the basis.

The testimony showed they were found in possession of appellant. However, mere possession of stolen goods unaccompanied by other evidence of guilt is not to be regarded as *prima facie* evidence, even of burglary.

1 *Wharton Crim. Ev.*, Sec. 191, p. 201.

“The possession of the stolen goods must be personal, recent and unexplained and must involve a distinct and conscious assertion of property by the defendant”.

1 *Wharton Crim. Ev.*, Sec. 191, p. 199.

The charge set up in the indictment is that appellant stole the tools on or about January 1, 1942, and since he was found Not Guilty of possession of the tools and all counts of the indictment relating to possession were dismissed, then the evidence here presented must be viewed in the light of the single count of the indictment, to-wit: that he did on or about January 1, 1942, take and carry away personal property of the United States with intent to steal and purloin the same.

Obviously to support such a charge, there ought to be at least some identification of the article or articles as being the personal property of the United States.

The taking, in order to support a charge of larceny, must be against the will of the owner or at least without his consent. In other words, the act of taking must be a trespass against the owner's possession.

18 *Am. & Eng. Ency. of Law*, 2d, p. 469.

Further, the thing taken and carried away must be the property of another.

18 *Am. & Eng. Ency. of Law*, 2d, p. 498.

ASSIGNMENT OF ERROR No. 12.

The Court erred in sustaining objections on the grounds of incompetency, immateriality and irrelevancy to the testimony of the appellant in attempting to show the method and means provided by the Field to return tools upon transfer to another position on the Field (T. 73).

Appellant had testified up to the point where he partially showed the regulations of the Army under which he was required to work, but he was prohibited from showing the entire setup as to how tools could come into his possession and the means and methods provided at the Field for getting them out of his possession. The regulations of the Army are as much the law as any statute of Congress, particularly as concerns civilian employees on that field.

The rules and regulations of governmental agencies "become a mass of that body of public records of which the Courts take judicial notice".

Caha v. United States, 152 U.S. 211, 38 Law. Ed. 415, 14 Sup. Ct. 513, 517.

Therefore, in this case the Court erred in failing and neglecting to take judicial notice of those regulations in force at the Field and under which all civilian employees must serve and which regulations provide the only means at the Field whereby an employee can obtain tools with which to work or can obtain tools to take from the Field.

ASSIGNMENT OF ERROR No. 13.

The Court erred in sustaining objection to introduction in evidence of demand of McClellan Field against appellant in the sum of \$61.24 to cover value of lost tools, which demand appellant received through the mails (T. 77).

This evidence was competent to further show the system established by the Army under which employees were issued tools and if they were not returned, the value of tools were charged against the employee and he had to pay for them. Such evidence would further show that there was no intent on the part of appellant to steal any tools and also to show that any tools he had which might be identified as property of the United States had come into his possession lawfully under the rules and regulations of the Field.

Counsel for appellant offered to show the Court that this was the system established and maintained at the Field, but was not allowed to introduce any evidence on the point.

Apparently the indictment itself was taken as sufficient evidence of the guilt of appellant and no further testimony or evidence was required. The course of the trial established the fact that the Court quite evidently took the two statements of the appellant, the one before the court martial and the other before the F.B.I. Agent, as absolute demonstrative evidence of the guilt of the appellant and that any statement or assertion or any other evidence offered or submitted by appellant tending to rebut either of those statements was not considered and was refused by the trial Court.

We have always understood that in any crime such as this, it must be proven that the accused acted with a felonious intent. That is, the taking and the carrying away must be with the intent, without claim or pretense of right or justification, to deprive the owner of his property wholly and permanently.

18 *Am. & Eng. Ency. of Law*, 2d, p. 500.

Evidently the Army knew for a long time that this appellant had tools of the United States in his possession (T. 82). The records were carried in the Field and the matter of taking or of possession was considered a mere bookkeeping routine, else the authorities of the Field would not have billed the appellant for lost tools in the sum of \$61.24 (T. 78), nor have given him a receipt for \$52.92 (T. 81) for tools paid for by withholding that sum from his salary.

ASSIGNMENT OF ERROR No. 14.

The Court erred in sustaining objections to introduction in evidence of 12 memorandum receipts issued by McClellan Field to appellant and listing tools contained in the indictment (T. 78-81).

The reasons why such memorandums should have been admitted are:

1. They showed that all tools named in the indictment, other than those classified as expendable and non-recoverable and other than those owned by appellant, were regularly issued to appellant under the system used at McClellan Field, for which he was charged and which he had paid for.

2. They were competent evidence to prove appellant was not guilty of stealing any of the tools.

3. They were material to his defense.

4. They were relevant to the issue of guilt or innocence of appellant.

What we have said under Assignments of Error Nos. 12 and 13 above applies equally here and repetition is unnecessary.

ASSIGNMENT OF ERROR No. 15.

The Court erred in sustaining objection to admission of Receipt No. E-N-3753, Voucher 1-12-44 issued by McClellan Field to appellant either in December, 1943, or January, 1944, showing payment of \$52.92 for tools (T. 81).

The reasons why the voucher should have been admitted are:

1. That it was part of the system in use at the Field.

2. That it was competent to show the innocence of appellant of either intent to steal or felonious possession of tools.

3. That it was relevant to the issue of guilt or innocence.

4. That it was material to the defense of both theft and possession.

ASSIGNMENT OF ERROR No. 16.

The Court erred in sustaining objection to testimony of appellant as to conversation had with Captain Pearce the day following the date of the alleged "confession" set forth under Assignment of Error No. 9, above (T. 54).

The reasons this testimony and evidence should have been admitted are:

1. It showed the extent of the grilling appellant received in the effort to obtain the so-called confession.

2. It is established the fact that this appellant believed and was warranted in his belief that he was on November 25, 1943, still under court martial since its convening on the day previous.

3. It showed the so-called confession was obtained pursuant to third-degree methods.

4. It was competent to show the whole course of the investigation to which this appellant was subjected.

5. It was relevant and material to show the whole of this third-degree proceeding which appellee had opened up in its case in chief.

We have treated this "confession" and the grilling appellant received before, during and after its date under Assignments of Error Nos. 9 and 10, and we need not add to those arguments.

ASSIGNMENT OF ERROR No. 17.

The Court erred in striking out the testimony of appellant regarding being in custody of Mr. Chandler (T. 86).

This is part of the showing of appellant in support of his showing none of these alleged "confessions" bore the least semblance to being voluntary. We have argued the points under Assignments of Error Nos. 9 and 10.

ASSIGNMENT OF ERROR No. 18.

The Court erred in sustaining objection to introduction in evidence of appellant's Exhibit "K" for identification: Pass for tools (T. 94).

The reasons why this evidence should have been admitted are:

1. It was competent to show the system in use at the Field under which employees were permitted to take tools from the Field.

2. It was relevant to the defense of appellant as showing tools could be off the Field and yet lawfully in possession of that individual.

3. It was material to the defense of appellant as showing that persons other than appellant were permitted to take tools from the Field to the homes.

In appellee's Exhibit No. 10 (T. 55) it will be noted that reference is made to articles given appellant on a pass to be taken from McClellan Field.

Since appellee had opened the question in its case in chief, appellant should have been accorded an opportunity to show how tools were given workmen on pass and taken from the Field with no time or date set for their return.

This evidence was essential in defense to show utter absence of any felonious intent in taking tools from the Field.

ASSIGNMENT OF ERROR No. 19.

The Court erred in sustaining objection to testimony of witness Dudley regarding expendable tools, on the sole ground that appellant had already testified on the same point (T. 95).

We were certainly entitled to show, by independent proof, that employees other than appellant were allowed to take government property away from the

Field; that such practice was well established; that it was routine, and that such person could hardly be held guilty of stealing.

Obviously, the Court presumed the appellant guilty as charged in the indictment.

The rejected testimony was proof of absence of felonious intent. True, it should not devolve upon a defendant to make such proof, but here it was. This appellant was tried under the theory that the indictment was proof of guilt and it was up to him to prove his innocence.

That being the case, appellant was entitled to present all evidence germane to his claim of not guilty and it was highly prejudicial error to deny him that privilege.

ASSIGNMENTS OF ERROR Nos. 20, 21 AND 22.

We have grouped these assignments as they all refer to the same elements, namely: the grant of the right of employees to take tools from the Field to their homes.

We have covered our objections under Assignment of Error No. 19, and need not repeat them here.

ASSIGNMENTS OF ERROR Nos. 23 AND 24.

The Court erred in sustaining objection of counsel for appellee on grounds it was incompetent, irrelevant and immaterial and no bearing on the guilt or inno-

cence of appellant to question asked of witness Dudley as follows (T. 97):

“Q. Do you know whether tools and equipment on the Field of usable character were thrown into the junk pile or into the fire pit where anyone could take them if they wanted them?”

The Court erred in sustaining objection of counsel for appellee on grounds it was incompetent, irrelevant and immaterial, no bearing on the guilt or innocence of defendant to question asked of witness Dudley as follows (T. 97):

“Q. Do you know of your own knowledge whether an employee prior to August, 1943, could obtain a pass from the authorities to take any of that material or tools from the junk pile or fire pit and take it off the Field”.

Where the Army discards material, it is common knowledge that it is either sold or junked. Appellant should have been accorded the right of proving this system was established and carried on at McClellan Field.

If the Army was violating some law, appellee should be prosecuting it. It may have been that this evidence was closely approaching that proof and for that reason must be kept from the record.

Why this appellant should be adjudged guilty of theft because he had lawfully in his possession certain articles claimed to have been stolen is stretching legal logic to a remarkable degree.

ASSIGNMENT OF ERROR No. 25.

The Court erred in rejecting the offer of proof of appellant to show that a foreman issuing tools to workmen would find himself with two of the same kind, as one workman would turn in the bit of a drill and another the shank and be reissued two drills. When the workmen quit or were transferred, the foreman would have two drills, was charged with one only, and he could never return the other (T. 98).

The proof should have been received because:

1. It was competent to show that tools from the Field found in the possession of any person off the Field, are not evidence either of theft or of unlawful possession.

2. It was relevant and material to the defense as showing absence of any criminal intent when tools were found in possession of this appellant.

Mere possession of the articles without evidence of felonious taking by appellant or some other person is no evidence of theft.

1 *Wharton Crim. Ev.*, Sec. 191, p. 201;
People v. Beaver, 49 Cal. 57, 58.

ASSIGNMENT OF ERROR No. 26.

The Court erred in finding appellant guilty of the first count of the indictment, that of theft, while finding him not guilty of possession on the remaining five counts.

1. The only evidence that could possibly connect the appellant with any crime was the fact he had tools in his possession.

2. To omit all evidence of possession from the case would leave nothing whercon to base a charge of theft.

3. To convict of theft alone necessitates indulging in a presumption of guilt, a presumption of intent, a presumption against reasonable doubt, resulting in a conviction founded solely upon presumptions based upon presumptions.

If a presumption of innocence follows a defendant throughout the trial and if all doubts and uncertainties are to be resolved in his favor, then this appellant is entitled to have considered the utter absence of evidence of theft and of intent to steal viewed in the light of the determination by the trial Court that appellant was not guilty of having the same articles in his possession.

This presumption of innocence "is not a will-o'-the-wisp, which appears and disappears as the trial progresses. The presumption does accompany the accused through every stage of the trial. And it is a presumption of law to be considered by the jury. Although not strictly evidence, it is in the nature of evidence in favor of the accused."

Dodson v. United States, 23 Fed. (2d) 401
(followed in *Turner v. United States*, 25 Fed.
(2d) 1023).

ASSIGNMENT OF ERROR No. 27.

The Court erred in refusing appellant a new trial on the grounds set forth in the written motion filed (T. 101).

Our preceding assignments of error have sufficiently covered this point.

CONCLUSION.

We submit that every inference or presumption of innocence of appellant was eliminated at the trial of this cause.

The question of reasonable doubt was never considered at any stage of the proceedings.

Obviously, the indictment was considered as evidence of appellant's guilt and any evidence that might tend to disprove it was barred by the trial Court.

The trial Court believed that the possession by appellant of the articles described in the indictment was sufficient to convict appellant of the first count thereof, as that is the only evidence of theft appellee could establish. No witness ever saw any of those articles at McClellan Field and no witness testified he, personally, knew any of those articles were missing from the Field. No person saw appellant take any of them from the Field, and no witness was produced who ever heard the appellant say he stole them or that he took them away with intent to keep them or convert them to his own use.

On its face the whole proceeding was far from attaining the dignity of a prosecution for a real crime.

The appellant had been employed by the Air Corps of the Army since March 1, 1929. At the time of his discharge he was Assistant Superintendent, Air Craft Shops (T. 63). As such he supervised the work of eighteen general foreman, thirty-seven assistant general foreman, and approximately fifty-five hundred Air Craft Shops employees (T. 72).

A thief could hardly have risen from a welder to such a responsible position. There is not a mark against his name on the rolls of the Air Corps.

Appellant was charged with and convicted of a crime of plain theft of a lot of battered, rusty tools, not one of which any mechanic would use in his daily work, and no foreman would permit use of at any time, yet appellant was found not guilty of having them in his possession. If they had been stolen, would he not likewise be guilty of having stolen goods in his possession? And if they were not stolen goods and appellant was not guilty of having them, then it must follow as a natural corollary that he was lawfully in possession. There is no middle ground here. Either appellant was lawfully entitled to the possession of the articles or he was not. Therefore, he could not be guilty of theft of something found to be lawfully in his possession.

There may be some error in our legal reasoning here, but careful analysis of the problem fails to indicate it.

We cannot follow reasoning that resolves that one can be guilty of stealing that which he is lawfully possessed of.

We believe our appeal is well founded in fact and that ample grounds exist for reversal.

We therefore pray that the judgment of conviction be set aside and reversed and that appellant be discharged from custody.

Dated, Sacramento, California,
May 10, 1944.

Respectfully submitted,

CHAS. L. GILMORE,

Attorney for Appellant.

No. 10,690

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

CLINTON B. McELHENY,

Appellant,

VS.

UNITED STATES OF AMERICA,

Appellee.

Upon Appeal from the District Court of the United States for the
Northern District of California, Northern Division.

BRIEF FOR APPELLEE.

FRANK J. HENNESSY,

United States Attorney,

EMMET J. SEAWELL,

Assistant United States Attorney,

THOMAS O'HARA,

Assistant United States Attorney,

Post Office Building, Sacramento, California,

Attorneys for Appellee.

FILED

JUN 11 1941

PAUL P. O'BRIEN
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Upon Appeal from the District Court of the United States for the
Northern District of California, Northern Division.

BRIEF FOR APPELLEE.

STATEMENT OF THE CASE.

The facts in this case are as follows:

The appellant had been a Government employee at San Diego in the year 1929, was transferred to the Sacramento Air Depot, McClellan Field in 1939 and remained at the latter place from 1939 until November 25, 1943. When first transferred to McClellan Field he was employed as a mechanic supervisor. On April 6, 1942 he was appointed group superintendent of the Maintenance Group. On September 1, 1942 he was

(NOTE): All references herein are to Reporter's Transcript, except as otherwise noted.

made general foreman of Aircraft Shops, and on October 13, 1942 he was made assistant superintendent of Aircraft Shops, which position he held until the termination of his employment on November 25, 1943. It should also be pointed out that appellant testified that he had charge of the "whole Maintenance Division at McClellan Air Field and that that Division covered an area of some 15 to 20 acres". (T. p. 107, lines 17-20.)

Thereafter, on the 7th day of January, 1944, appellant was indicted by the Federal Grand Jury of the Northern Division, Northern District of California, at Sacramento, in an indictment containing six counts. However, the appellant was only found guilty and sentenced on the first count of the indictment, which charged him with theft of Government property from McClellan Field, and we will not reiterate that count of the indictment as it is set out in full on page 2, et seq., of the Printed Transcript of Record. Therefore, we will confine ourselves throughout this brief to evidence in respect to the first count of the indictment. A brief summary of the evidence is as follows:

The first witness called in behalf of the Government was Mr. Arthur Chandler, Investigator for the Air Service Command with headquarters at the Sacramento Air Depot, McClellan Field, California, who testified that he had a conversation with the appellant on the 23rd day of November, 1943, in the presence of Captain Ark, Sergeant Hubbs and Andrew Cecchetti, in regard to certain Government property; that the appellant at that time advised the witness that he had taken to his home property that belonged to the

United States Government, and that he would be willing to take the investigator to his home for the purpose of determining what property in his home belonged to the Government, and that he would turn over to the investigator all property that belonged to the Government. (T. p. 3, lines 8-24.) Mr. Chandler accompanied the appellant to the latter's home and together they made an examination of a box of tools found in a bedroom of the house, and also of some tools found in a barn and house trailer in the rear of appellant's home. The tools so found on appellant's premises were in Court at the time of the trial and Witness Chandler identified such tools as having come from the appellant's premises under the circumstances hereinabove set forth. (T. pp. 4, 5, 6.)

The appellant also stated to Mr. Chandler that he had disposed of other Government property, such as tools and equipment, by throwing them down a well, and he took Mr. Chandler to the well and he, Chandler, could actually see the Government property on the bottom of the well, which was approximately 80 feet in depth.

The appellant also stated to Chandler that the reason he had thrown the Government property down the well was that he had become frantic and scared. (T. pp. 125-127.)

Warren Wilford Parker was next called by the Government. He testified that he was Supervisor in Charge of Tool Issue at McClellan Field, that he had been employed in that capacity for the past five years. This witness specifically identified a number of articles

set forth in the first count of the indictment, as follows: A 10" steel wrench (T. p. 10) which bore marks "U.S. Army". This is the wrench set forth in the indictment. (p. 8 of the Printed Transcript of Record.) He testified that the padlock which was introduced as Government's Exhibit No. 3, which bears the number "155", was similar to the padlocks used at McClellan Field and bore the same number as the padlocks used at McClellan Field. (T. p. 12, lines 2-9.) Witness Parker next identified Government Exhibit No. 4, "machinist's double point nine inch scriber", by the marks "U.S.A." upon it. This item is set forth in the indictment at page 6 of the Printed Transcript of Record. This witness likewise identified a pair of pliers marked "U.S." (Gov. Ex. No. 5), as coming from McClellan Field. (T. p. 13, lines 13-23.) He identified a steel tape (Gov. Ex. No. 6), marked "Air Corps, U.S. Army", as coming from McClellan Field. (T. p. 14, lines 3-10.) He further identified an 8" steel wrench marked "U.S.A." as coming from McClellan Field. (T. p. 14, lines 16-23; Gov. Ex. No. 7.) This witness identified a second pair of pliers by the mark "U.S." and identified such pliers as coming from McClellan Field. (T. p. 15, lines 3-18; Gov. Ex. No. 8.)

The foregoing tools and items are described in the indictment as it appears at page 6 of the Printed Transcript of Record.

The witness then identified a paper bag containing tools, all of which bore marks "U.S.A.", and stated that they were similar to tools so marked at McClellan Field, and these were the same tools that Wit-

ness Chandler identified as having taken from the appellant's home on November 23, 1943. (The paper bag of tools was marked Government's Exhibit No. 9 and testimony concerning it appear in T. p. 15, commencing at line 10 and ending at p. 16, line 22.)

This same witness further identified a box of tools and equipment which he stated he had examined and which he could identify as being similar to tools and equipment in stock as Government property at McClellan Field. (T. p. 16, line 3, and p. 17, line 19.)

The next witness called was Max V. Hubbs, a Sergeant at McClellan Field, attached to the Intelligence Department of the United States Air Forces. He testified that at the direction of Captain Ark he prepared a statement in longhand given to the Captain by the appellant, and that he, the witness, had written it up, and that the appellant read it and signed it "Clinton B. McElheny". The statement (Gov. Ex. No. 10), reflects the appellant's admission that the articles recovered by Mr. Chandler at appellant's home on November 23, 1943 were articles of Government property, and in addition to the articles recovered, the appellant in the statement sets forth a list of articles and equipment which he stated he disposed of on November 21, 1943. The articles disposed of by the appellant were the articles which were shown to Mr. Chandler at the bottom of the well. The statement further sets forth some articles which the appellant says were given to him on a pass to be taken from McClellan Field. (T. pp. 31-32.)

The importance of appellant's statement in respect to articles given or issued to him on a pass to be taken from McClellan Field will be developed in the argument to follow in relation to that portion of appellant's defense respecting his purported authority to take the articles listed in the indictment from McClellan Field.

The next witness called was Walter E. Moehle, Special Agent of the Federal Bureau of Investigation, who testified that he, after learning of the alleged theft of property by the appellant from McClellan Field, invited the appellant to come to his office in the Post Office Building at Sacramento, California. The appellant called at Mr. Moehle's office in the afternoon of November 29, 1943, and at that time gave a statement to Mr. Moehle, which was as follows:

"I, Clinton B. McElheny, make this statement to Walter E. Moehle, whom I know to be a special agent of the Federal Bureau of Investigation. I have been advised I need not make this statement; and no threats or promises have been made to me. I know it may be used in court.

"I have been a civilian employee of the War Department since 1929. I came to the Sacramento Air Depot in 1938 when Rockwell Field, San Diego, was moved to Sacramento, California. I was assistant general superintendent of the Maintenance Division. On or about December 15, 1941, or January 1942 I removed from the Sacramento Air Depot the items listed below and listed on the sheet identified as List Number 1, Pages 1, 2, 3 and 4. Since about January 1942 I have removed small items, as an occasional nut, bolt, screw and so forth.

“50 taps, hand; 75 drills (large and small of various sizes); 25 files; 25 reamers.

“Most of these items were in various boxes at Sacramento Air Depot and were materials charged out to me.

“I knew these items were property of the United States Government and I knew I should not have them in my possession; and was violating a federal law in so doing.

“I have read the above statement and say it is true.”

Signed: “Clinton B. McElheny.”

“Witnessed by: Walter E. Moehle, Special Agent, F.B.I., Sacramento, Calif., 11/29/43; Robert E. Goeke, Special Agent, F.B.I., Sacramento, Calif., 11/29/43.”

(T. pp. 41, 42; Gov. Ex. No. 11.)

It should be noted that the list of articles which is attached to the statement set out above, and which is a part of Government's Exhibit No. 11, is identical with the tools which the Government alleges were stolen by the appellant from McClellan Field, and which tools and equipment were introduced into evidence as Exhibits 2 to 9, inclusive, and Exhibit 12.

Following the introduction of the statement above referred to the box of tools previously marked Government's Exhibit No. 1, identified by Witnesses Chandler and Parker, was offered in evidence as Government's Exhibit No. 12.

Whereupon appellee rested.

The appellant, McElheny, testified that he recalled throwing United States Government property down a well, and that he showed Mr. Chandler where he had thrown it.

POSITION OF THE GOVERNMENT.

It is the contention of the Government that the evidence in this case is sufficient in all respects to uphold the verdict of guilty, and, furthermore, that no confessions or admissions obtained from the appellant were in violation of the doctrine announced in the recent case of *McNab v. United States*, 318 U.S. 332, 63 S.Ct. 608.

ARGUMENT.

Appellant in his brief sets forth some twenty-seven ASSIGNMENTS OF ERROR, of which Assignments 1 to 8, inclusive, and 11, relate to the admission in evidence of certain physical exhibits, namely, tools and equipment.

ASSIGNMENTS OF ERROR NOS. 1 to 7, inclusive, refer to U. S. Exhibits numbers 2 to 8, inclusive, which consist of wrenches, padlocks, machinist's scriber, pliers and steel tape. Appellant advances the objection that none of these exhibits were identified as having been at McClellan Field, and that no witness produced by the Government could identify them as property of the United States.

It is the Government's contention that the exhibits were amply identified in the following manner: (1) by Witness Parker, who testified concerning the marks "U.S.A.", etc.; (2) by the Witness Chandler, who found them at the appellant's home or premises; (3) by the appellant himself, who informed Chandler that they were Government property taken from McClellan Field, and his further statement to Special Agent Moehle of the Federal Bureau of Investigation, wherein the appellant again reiterated the Government ownership and taking from McClellan Field.

ASSIGNMENT OF ERROR NO. 11 also refers to a box of tools in evidence as Government's Exhibit No. 12, and again appellant argues that there was no identification of the contents of the box. This exhibit contained numerous small items and it was not attempted at the trial to specifically identify each and every tool or article contained in the box. However, the witnesses Chandler and Parker both were familiar with the contents of the box, and again Chandler testified that such contents were taken from the appellant's home or premises and that he, the appellant, had informed Chandler that all the articles therein were Government property and had been taken by him from McClellan Field. Again, as in the case of Government's Exhibits numbered 2 to 9, inclusive, the appellant further stated to Special Agent Moehle of the F.B.I., that such articles were Government property taken by him from McClellan Field and that he knew the items in question were property of the United States Government, and that he knew he should not

have them in his possession, and was violating Federal law in so doing.

Appellant at page 12 of his brief cites the well established rule that possession of stolen goods, standing alone, is insufficient as *prima facie* evidence of guilt of theft. But the evidence here goes far beyond the mere possession. The possession here involves a distinct and conscious assertion by the appellant of his knowledge that they were property of the United States Government, that he took them from McClellan Field, and that he knew he was violating Federal law to so do.

In ASSIGNMENT OF ERROR NO. 8 appellant complains of the admission of U. S. Exhibit No. 9, a miscellaneous lot of tools, and characterizes this exhibit as "a lot of worn and rusted wrenches, files, and a hodge podge of odds and ends such as found around the home shop of any machinist". We submit to this Honorable Court that there is no evidence to support the appellant's characterization—in fact, it is distinctly to the contrary, as reflected by appellant's own testimony and the exhibits which are in evidence.

In ASSIGNMENT OF ERROR NO. 9 appellant complains of the admission of Government's Exhibit No. 10, which is the statement of the appellant identified by the witness, Sergeant Hubbs, on the ground it was hearsay and was an extra-judicial confession obtained by trick and ruse.

Obviously, it was not hearsay, because it was a statement made by the appellant. The appellant in his

statement that the statement was obtained by trick, artifice and fraud, is apparently contending that the trick, artifice and fraud, were an attempt to convey to the appellant the idea that he was being court martialed.

The Twenty-fourth Article of War provides as follows:

“No witness before a military court, commission, court of inquiry, or board, or before any officer conducting an investigation, or before any officer, military or civil, designated to take a deposition to be read in evidence before a military court, commission, court of inquiry, or board, or before an officer conducting an investigation, shall be compelled to incriminate himself or to answer any question the answer to which may tend to incriminate him, or to answer any question not material to the issue when such answer might tend to degrade him.”

T. 10 USCA, Sec. 1495.

As Sergeant Hubbs testified, the military authorities were simply conducting an investigation, and in so doing were informing the appellant of his rights under the Twenty-fourth Article of War, which article relates not only to military courts, but also to military officers conducting investigations.

ASSIGNMENT OF ERROR NO. 10 attacks the admission of Government's Exhibit No. 11, which is the second statement obtained from the appellant by a Federal Bureau of Investigation Agent.

Appellant in his brief at page 10 said he was not under arrest, although he was advised and informed that he was. There is nothing in the record to indicate that at the time the appellant voluntarily appeared at the Federal Bureau of Investigation office he was either under arrest or had ever been advised that he was, and there is no evidence of any duress being exerted by the Federal Bureau of Investigation to obtain the statement from the appellant. Title 5, USCA 300(a), requires that a person arrested shall be immediately taken before a committing officer, but in the instant case, at the time of appellant's visit to the Federal Bureau of Investigation office he was not under arrest and was not under any compulsion to either go to that office or to make any statement after he arrived there. As a matter of fact, he went there voluntarily, simply upon the oral request of the agent. So far as the appellant's contention that the burden is upon the prosecution to prove the confession was voluntary, assuming, without admitting that to be the law, the Government in this case actually did prove that the statement was voluntary, as the appellant stated in his statement as follows:

“I have been advised I need not make this statement, and no threats or promises have been made to me. I know it may be used in court.”

As to ASSIGNMENT OF ERROR NO. 12, it is appellant's contention the Court erred in sustaining objections of the Government to the attempt by appellant to show the method and means provided by the Field to return tools upon transfer to another position

on the Field. We are at a loss to understand how this evidence would be competent, or material, or relevant in any way whatsoever. The sole issue before the Court was whether or not the appellant had stolen the articles in question from McClellan Field.

As we have pointed before, the appellant had already admitted taking the articles from the Field, had admitted that he knew it was against Federal law to take the articles in question from the Field. Undoubtedly there are rules and regulations by which tools can be transferred from the person to whom they are issued back into the tool room at the Field. However, the appellant has never contended that the evidence he offered would tend to prove that appellant had the right to remove the tools in question in this case from the Field to his home for personal use. Therefore, we submit that the objection was well taken.

In ASSIGNMENT OF ERROR NO. 13 the appellant contends that it was error by the Court to sustain an objection to the introduction of evidence of the demand of McClellan Field against appellant in the sum of \$61.24 to cover value of lost tools, which demand appellant received through the mails.

It is to be noted in this regard that the letter the appellant attempted to offer in evidence was dated January 4, 1944, a month and a half after appellant's discharge from McClellan Field. We submit that this letter would have no bearing upon the guilt or innocence of the appellant as to the charge against him in this case, that is, as to whether or not he had stolen

the tools in question from McClellan Field. Assuming, without conceding, that some of the tools in question came into appellant's hands lawfully for use at McClellan Field, the appellant does not prove by this evidence that appellant had the right to remove those tools to his home for his own personal use.

In this Assignment of Error the appellant also states:

“Apparently the indictment itself was taken as sufficient evidence of the guilt of appellant and no further testimony or evidence was required.”

Such a statement is, of course, absurd. The Government introduced testimony by witnesses Chandler and Parker that the property in question was property of the United States Government. Second, the Government actually introduced the physical evidence, to-wit, a number of tools marked “U.S.A.”, “U.S.A. Air Corps”, etc. Third, the Government showed that appellant had access to this property at McClellan Field. Fourth, the Government showed that the articles in question were found at appellant's home. Fifth, the Government showed that appellant on at least three separate occasions stated that he had taken the articles in question from McClellan Field and that he knew it was against Federal law to do so.

In ASSIGNMENT OF ERROR NO. 14 appellant contends that the Court erred in sustaining objections to introduction in evidence of 12 memorandum receipts. We submit that the Court was correct in its ruling as the receipts would not under any stretch of

the imagination prove, or tend to prove, whether or not the appellant stole the tools in question from McClellan Field.

ASSIGNMENT OF ERROR NO. 15 is practically identical with Assignment of Error No. 14, except that it relates to a voucher issued at McClellan Field to appellant either in December, 1943, or January, 1944, showing payment of \$52.92 by appellant for tools. It is obvious that this voucher could have no bearing upon the guilt or innocence of the appellant in this case as the voucher was issued, according to the appellant, in December, 1943, or January, 1944, which was subsequent to the date of the offense charged in the indictment. Further, all that could possibly be shown by the voucher under any circumstances would be that appellant, according to his contention, paid \$52.92 to McClellan Field for tools, and there is no contention by the appellant that this payment could be connected in any way with the tools in question in the indictment in this case.

ASSIGNMENT OF ERROR NO. 16—the appellant contends the Court erred in sustaining objection to testimony of the appellant as to a conversation had with a Captain Pierce the day following the date of the statement given by appellant on November 24, 1943 to officers at McClellan Field. It should be noted that any such testimony by the appellant would be a self-serving declaration, as the conversation occurred, according to appellant's contention, the day after appellant gave this statement or confession. It fur-

ther can be noted that appellant did not call Captain Pierce as a witness in his behalf. At any event, it is clear that what was said by the appellant or Captain Pierce the day following the taking of the statement could not in any way tend to show whether or not the statement was obtained by "third-degree methods" as the appellant does not contend that Captain Pierce was present at the time the statement was given.

ASSIGNMENT OF ERROR NO. 17 refers to the Court's ruling in striking out the testimony of appellant regarding being in custody of Mr. Chandler. It should be noted that the Court, of course, allowed the appellant to state all the facts and circumstances surrounding the entire transaction involved in this case and it is clear that when the appellant attempted to testify that he was in custody of Mr. Chandler it was a conclusion and was properly objectionable.

ASSIGNMENT OF ERROR NO. 18 relates to the Court's ruling sustaining the objection to the introduction in evidence pass for tools which were not mentioned in the indictment and could not possibly have any bearing upon the guilt or innocence of the appellant as charged in the indictment. It is, of course, not the Government's position that under certain conditions tools, trucks, airplanes, etc., cannot be removed from McClellan Field. However, it is the contention of the Government in this case that the appellant had no right to remove from McClellan Field the tools mentioned in the indictment in this case, and we have, of course, limited ourselves to that contention, and we submit that the Court was correct

in sustaining the objection of the Government in this case.

ASSIGNMENT OF ERROR NO. 19 is practically identical in substance with Assignment of Error No. 18, and we submit the Court was correct in its ruling in sustaining the objection to the offered testimony of Witness Dudley.

ASSIGNMENTS OF ERROR NOS. 20, 21, 22, 23 and 24 are also identical with Assignments of Error Nos. 18 and 19, and we will not further discuss the matter.

ASSIGNMENT OF ERROR NO. 25 relates to appellant's contention that the Court erred in rejecting the offer of proof of appellant "to show that a foreman issuing tools to workmen would find himself with two of the same kind, as one workman would turn in the bit of a drill and another the shank and be re-issued two drills. When the workmen quit or were transferred, the foreman would have two drills, was charged with one, and he could never return the other." We submit the Court did not err in rejecting this offer of proof as it is apparent it could not possibly have any bearing upon the guilt or innocence of the appellant.

ASSIGNMENT OF ERROR NO. 26 alleges that the Court erred in finding the appellant guilty of the first count of the indictment, that of theft, while finding him not guilty of possession on the remaining five counts of possession. We submit that the evidence was sufficient on which to find the appellant guilty of hav-

ing stolen the property in question from McClellan Field. As we have pointed out before, the property in question in the indictment in this case was, first, Government property, second, was found in appellant's possession at his home, third, that appellant admitted it was Government property, fourth, admitted he had taken the articles in question from McClellan Field, and fifth, appellant knew that it was wrong to do so and against the Federal statutes.

We further submit that the Court was also correct in finding the appellant was not guilty on the possession counts, for this reason: Section 101 of Title 18 USCA provides:

“RECEIVING STOLEN PUBLIC PROPERTY. Whoever shall receive, conceal, or aid in concealing, or shall have or retain in his possession with intent to convert to his own use or gain, any money, property, record, voucher, or valuable thing whatever, of the moneys, goods, chattels, records, or property of the United States, which has theretofore been embezzled, stolen, or purloined by any other person, knowing the same to have been so embezzled, stolen, or purloined, shall be fined not more than \$5,000, or imprisoned not more than five years, or both; and any such person may be tried either before or after the conviction of the principal offender.”

It is to be noted that it is only illegal for one who has obtained stolen property from “any other person” to have it in his possession. The evidence in this case was all to the effect that the appellant did not obtain the property from another person who had stolen the

property, but that he, himself, stole the property and removed it from McClellan Field.

In ASSIGNMENT OF ERROR NO. 27 the appellant makes no comment, therefore, neither will we.

CONCLUSION.

We submit that the record in this case establishes beyond any reasonable doubt that the property in question was Government property, (2) that it was removed from McClellan Air Field by the appellant; (3) that appellant converted the same to his own use and actually had it at his home; (4) that appellant knew it was wrong as he actually disposed of a box of tools taken from the Field down a well, and stated in his statement to Special Agent Moehle of the Federal Bureau of Investigation that he knew it was against Federal law to remove the property from McClellan Field.

We further submit that there is no evidence whatsoever in the record that even indicates that any force, duress, or promises of immunity were used by the Government in order to obtain the statement in question from the appellant. Rather, the record is clear that the appellant, as a matter of fact, was not arrested until after he had given his statement to Mr. Moehle on November 29, 1943, and that up until that time all the actions of the appellant had been voluntary.

We wish also to point out to the Court that appellant did not take an exception to a ruling of the Court during the entire course of the trial. Of course, while it is true that the Court may take notice of plain error in the record, no such plain error has been alleged by the appellant, and we respectfully submit that on this ground alone the Court should affirm the judgment of the Trial Court.

Dated, Sacramento, California,

June 14, 1944.

Respectfully submitted,

FRANK J. HENNESSY,

United States Attorney,

EMMET J. SEAWELL,

Assistant United States Attorney,

THOMAS O'HARA,

Assistant United States Attorney,

Attorneys for Appellee.

